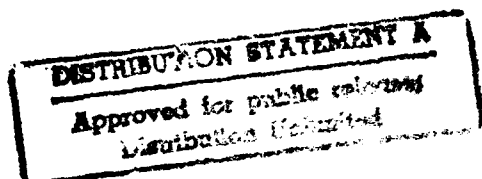


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ENVIRONMENTAL LAW

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and United States Marine Corps attorneys.

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TABLE OF CONTENTS AND AUTHORS

Ch. 1.	Department of the Navy (DON) Environmental Policy	CDR John P. Quinn
Ch. 2.	Sovereign Immunity, Preemptions, and the Unitary Executive Doctrine	CAPT Thomas N. Ledvina
Ch. 3.	Federal Facility Compliance	Mr. Peter M. Kushner
Ch. 4.	Fees and Taxes	CAPT Thomas N. Ledvina
Ch. 5.	Organization for Environmental Compliance	CDR John P. Quinn
Ch. 6.	Environmental Compliance Evaluations	LCDR Marc G. Laverdiere
Ch. 7.	Funding Environmental Compliance	CDR Richard T. Evans
Ch. 8.	Reporting Violations	CDR Roger R. Claussen
Ch. 9.	Environmental Litigation	LCDR Marc L. Swartz
Ch. 10.	Personal Liability for Violation of Environmental Laws	LtCol. Orval E. Nangle
Ch. 11.	Clean Air Act (CAA)	CDR Paul C. Johnson / Maj. Jonathan R. Scharfen
Ch. 12.	The Clean Water Act (CWA)	LCDR Jeffrey W. Styron
Ch. 13.	Protection of Wetlands	CDR David S. Shepherd
Ch. 14.	Safe Drinking Water Act (SDWA)	CDR Roger R. Claussen
Ch. 15.	Resource Conservation and Recovery Act (RCRA)	Mr. Peter M. Kushner
Ch. 16.	Underground Storage Tanks (USTs)	Ms. Rebecca M. Hommon
Ch. 17.	Emergency Planning and Community Right to Know Act and Pollution Prevention Act (EPCRA)	LCDR Marc G. Laverdiere / Capt Patrick J. Uetz, Jr.
Ch. 18.	CERCLA	Ms. Judith A. Conlow
Ch. 19.	Toxic Substance Control Act (TSCA)	Ms. Pamela S. Morris
Ch. 20.	Asbestos	Ms. Rebecca M. Hommon
Ch. 21.	Oil Pollution	CDR David S. Shepherd
Ch. 22.	Shipboard Environmental Protection	CDR John P. Quinn

- Ch. 23. Ocean Dumping Act (ODA)** CDR Michael J. Suszan
- Ch. 24. Afloat Hazardous Material / Hazardous Waste (HM / HW) Control** CDR Michael J. Suszan
- Ch. 25. Medical Waste Act** CDR Michael J. Suszan
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- Ch. 27. The Coastal Zone Management Act (CZMA)** CAPT Thomas N. Ledvina
- Ch. 28. Endangered Species Protection** LCDR Michaelleen Mason
- Ch. 29. Wildlife Protection** Ms. Pamela S. Morris
- Ch. 30. National Marine Sanctuaries** CDR Richard T. Evans
- Ch. 31. Wildlife Refuges and Wilderness** Ms. Pamela S. Morris
- Ch. 32. Land Management for Natural Resource Protection** Ms. Anne Rathmell-Davis
- Ch. 33. Protection of Historic and Archeological Resources** Ms. Angela M. Ryan
- Ch. 34. The Air Installation Compatible Use Zone (AICUZ) Program** Maj. Robert G. Conway, Jr.
- Ch. 35. Base Closure and Realignment** Ms. Anne Rathmell Davis
- Ch. 36. Environmental Protection Overseas** CAPT Thomas N. Ledvina
- Ch. 37. Environmental Issues in Acquisition** Ms. Mary C. Sullivan
- Appendices** LCDR Jeffrey W. Styron
- i. Acronyms
 - ii. EPA Federal Facilities Coordinators
 - iii. State Environmental Program Telephone Numbers
 - iv. DON Environmental Law Attorneys
 - v. Environmental Law Training and Research Materials

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CHAPTER I

DEPARTMENT OF THE NAVY (DON) ENVIRONMENTAL POLICY

0101 REFERENCES

- A. U.S. Navy Regulations, 1990
- B. OPNAVINST 5090.1A; Subj: ENVIRONMENT AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 1
- C. Marine Corps Order P5090.2; Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 1

APPENDICES

- (A) 141421Z APR 94, Secretary of the Navy, *Earth Day 1994 Message*
- (B) 151200Z MAR 93, Chief of Naval Operations (CNO), *Navy Environmental Program*
- (C) White Letter 2-94, Commandant of the Marine Corps (CMC), *Environmental Compliance*

0102 INTRODUCTION. This chapter discusses the various sources of environmental policy applicable to DON activities. Like environmental law itself, DON environmental policy changes over time. Users of this Deskbook should be sure to use the most current version of the references cited.

0103 LAW AND POLICY

A. *Distinguishing between law and policy.* Many authorities impose environmental requirements which apply, either as law or as policy, to DON activities. In general, requirements imposed by Congress, state legislatures, and

federal and state regulatory agencies are considered requirements of law. Environmental requirements imposed by the President, by the Department of Defense (DOD), and by DON apply as a matter of policy. The nature of the requirement as law or policy can be important. Upon this distinction turn important issues of enforceability, funding availability, and public perception. Though important, this distinction is not always clear. Not all regulatory agency pronouncements, for example, carry the force of law. Some Presidential, DOD, and DON policy requirements, though not enforceable in civilian courts, carry the force of law in that they can be enforced in courts-martial or administrative proceedings. It is therefore essential that DON command counsel be actively engaged in the planning, funding, and execution of the command's environmental program, to ensure that decision makers fully comprehend the source, nature, and risks associated with the various applicable environmental requirements.

B. *DON authorities on law and policy.* Although the distinction between law and policy is sometimes murky, the respective roles of DON attorneys vis-a-vis their clients is clear. Attorneys advise on the law; clients (DON military commanders and civilian leadership) establish policy. While it is not inappropriate for DON attorneys to advise on policy matters from perspectives other than legal (i.e., practical, political, or public perception), both attorney and client must understand their respective roles and the context in which the attorney's advice is given. Per reference (a) paragraph 0327, the General Counsel (GC) is primarily responsible for environmental law advice within DON. Legal issues requiring a Departmental position should be referred to the GC through procedures established by cognizant authority.

0104 DON ENVIRONMENTAL POLICY DOCUMENTS

A. *Regulations and instructions.* Overall DON environmental policy is established by the Assistant Secretary of the Navy for Installations and Environment (ASN (I&E)). Service policy necessary for execution of the overall DON policy is established by CNO in reference (b), and by CMC in reference (c). Subordinate Navy and Marine Corps commanders exercise policy making authority as delegated by CNO and CMC.

B. *Policy Statements.* From time to time the Secretary of the Navy, CNO, CMC and subordinate commanders issue policy statements reflecting the DON or service views on environmental matters. While generally not containing mandatory requirements, such policy statements provide the background against which command environmental programs should be designed. Appendices A through C of this chapter are recent significant environmental policy statements.

APPENDIX A

UNCLASSIFIED
NAVAL MESSAGE
DEPT OF NAVY

ROUTINE ZYUW RUENAAA1122 1041504
R 141421Z APR 94 ZEX ZYB
FM SECNAV WASHINGTON DC//SN//
TO ALNAV

UNCLAS //NO5090//
ALNAV 040/94
MSGID/GENADMIN/OASNIE-ES//
SUBJ/EARTH DAY 1994//

RMKS/1. EARTH DAY, WHICH HAS BEEN TRADITIONALLY OBSERVED ON 22 APRIL EACH YEAR SINCE THE FIRST OBSERVANCE IN 1970, IS ONE OF THE MOST IMPORTANT NATIONAL EVENTS FOR ENVIRONMENTAL AWARENESS AND EDUCATION. TO DEMONSTRATE THE IMPORTANCE OF THIS EVENT, DEFENSE SECRETARY WILLIAM PERRY HAS DECLARED APRIL 22, 1994, "ENVIRONMENTAL OPEN HOUSE DAY" AT ALL MILITARY INSTALLATIONS. ALL ACTIVITIES WILL BE CONDUCTED IN ACCORDANCE WITH APPROPRIATE SECURITY REQUIREMENTS. EARTH DAY PROVIDES AN EXCELLENT OPPORTUNITY WITHIN THE DEPARTMENT OF THE NAVY TO RENEW OUR INDIVIDUAL COMMITMENT TO ENVIRONMENTAL PROTECTION, TO STRENGTHEN ENVIRONMENTAL PARTNERSHIPS IN OUR LOCAL COMMUNITIES, AND TO SHOWCASE THE PROGRESS WE ARE MAKING IN THE AREAS OF ENVIRONMENTAL COMPLIANCE, CONSERVATION, POLLUTION PREVENTION, AND NATURAL RESOURCES STEWARDSHIP.

2. THE NAVY AND MARINE CORPS AREA OF OPERATIONS INCLUDES THE GLOBAL AIR, LAND, MARINE, AND ESTUARINE ENVIRONMENTS. WE ARE THE USES, MANAGERS, AND PROTECTORS OF A SIGNIFICANT PORTION OF THE NATIONS MOST ECOLOGICALLY IMPORTANT LAND AND WATER AREAS. OUR INSTALLATIONS' ENVIRONMENTAL AND NATURAL RECOURS PROGRAMS EMPHASIZE SUSTAIN ENVIRONMENTAL COMPLIANCE, INNOVATION TO PREVENT POLLUTION, RESOURCE PROTECTION AND CONSERVATION, COOPERATIVE PROJECT VENTURES, AND PUBLIC INVOLVEMENT AND AWARENESS. WE ARE PART OF A NEW COMPREHENSIVE APPROACH TO ADDRESSING LOCAL, REGIONAL, AND GLOBAL ENVIRONMENTAL CHALLENGES. TODAY'S SAILORS AND MARINES ARE MAKING A DIFFERENCE AND ARE TAKING THE LEAD IN MAKING THE

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WORLD A HEALTHIER, SAFER PLACE TO LIVE FOR ALL OF US AND FOR OUR CHILDREN.

3. I COUNT ON ALL HANDS TO CONTINUE IMPROVEMENT OF OUR ENVIRONMENTAL RECORD.

4. RELEASED BY THE HONORABLE JOHN H. DALTON.//

BT

CNO WASH DC

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APPENDIX B

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UNCLASS PERSONAL FOR COMMANDERS, COMMANDING OFFICERS, AND
OFFICERS IN CHARGE FROM KELSO/N00000//

NAVOP

MSGID/GENADM!N/CNO//

SUBJ/NAVY ENVIRONMENTAL PROGRAM//

REF/A/DOC/OPNAVINST 5090.1A/02OCT90//

AMPN/NAVY ENVIRONMENT AND NATURAL RESOURCES PROGRAM
MANUAL//

RMKS/1. BACKGROUND. TODAY'S NAVY FACES AN INCREASINGLY
PERVASIVE AND COMPLEX SET OF ENVIRONMENTAL REQUIREMENTS
AFFECTING OUR OPERATIONS AT SEA, IN THE AIR, AND ASHORE.
EXPERIENCE HAS SHOWN THAT THE CONSEQUENCES OF LESS THAN FULL
COMPLIANCE WITH THOSE REQUIREMENTS CAN BE SEVERE.
ENFORCEMENT ACTIONS HAVE BEEN INITIATED AGAINST NAVY AND OUR
PEOPLE. OPERATIONS HAVE BEEN DISRUPTED AND ACCESS TO CRITICAL
TRAINING AREAS HAS BEEN PUT IN JEOPARDY DUE TO ENVIRONMENTAL
REQUIREMENTS. PROTECTION OF THE NATURAL ENVIRONMENT IS
MISSION IMPERATIVE. IT REQUIRES THE ATTENTION AND COMMITMENT
OF EVERY NAVY OFFICER, ENLISTED, AND CIVILIAN EMPLOYEE. THIS
MESSAGE DISCUSSES THE NAVY ENVIRONMENTAL VISION, PROVIDES
INFORMATION REGARDING FUTURE CHALLENGES, AND ADDRESSES
ACTIONS BEING TAKEN TO ACHIEVE SUCCESS IN THIS CRITICAL AREA.

2. NAVY ENVIRONMENTAL VISION. ENVIRONMENTAL PROTECTION AND
MISSION PERFORMANCE ARE INEXTRICABLY LINKED. TODAY'S NAVY
MUST BE AN ENVIRONMENTAL LEADER WHILE EFFECTIVELY EXECUTING
THE NATIONAL DEFENSE MISSION. TO ACHIEVE THIS END, ALL NAVY
OPERATIONS WILL BE CARRIED OUT IN COMPLIANCE WITH APPLICABLE
ENVIRONMENTAL REQUIREMENTS, TAKING CARE TO MINIMIZE OR
ELIMINATE ANY ADVERSE EFFECTS. AS A LEGACY TO FUTURE
GENERATIONS, WE MUST ALSO TAKE POSITIVE ACTION TO SAFEGUARD
AND IMPROVE THE QUALITY OF THE NATURAL AND THE CULTURAL
RESOURCES ENTRUSTED TO OUR STEWARDSHIP.

3. FUTURE CHALLENGES. SOME OF THE MOST SIGNIFICANT PROBLEMS
CONFRONTING US ARE:

A. SHIPBOARD SOLID WASTE MANAGEMENT. UNDER CURRENT LAW, EFFECTIVE 1 JANUARY 1994, NAVY SHIPS WILL BE PROHIBITED FROM DISCHARGING PLASTICS ANYWHERE AT SEA AND WILL BE AUTHORIZED TO DISCHARGE ONLY FOOD WASTES IN "SPECIAL AREAS" SUCH AS THE MEDITERRANEAN SEA AND PERSIAN GULF. DURING 1993, NAVY WILL SEEK LEGISLATION WHICH WOULD AMEND THESE REQUIREMENTS TO THOSE WHICH ARE TECHNOLOGICALLY ACHIEVABLE IN NAVY SHIPS AND WOULD EXTEND THE COMPLIANCE DEADLINE UNTIL THE NECESSARY HARDWARE CAN BE INSTALLED. IN THE MEANTIME, NAVY VESSELS AND THEIR SUPPORTING SHORE ESTABLISHMENT MUST CONTINUE CURRENT EFFORTS TO REDUCE SHIPBOARD PLASTICS USAGE AND REFRAIN FROM PLASTICS DISCHARGE AT SEA TO THE EXTENT PRACTICABLE.

B. OZONE DEPLETING SUBSTANCES (ODS) ELIMINATION. ODS INCLUDE CHEMICALS IN WIDESPREAD USE BY MILITARY SERVICES AND INDUSTRY AS SOLVENTS, REFRIGERANTS, AND FIREFIGHTING AGENTS. INTERNATIONAL CONVENTION AND FEDERAL LAW REQUIRE PHASE OUT OF ODS PRODUCTION OVER THE NEXT SEVERAL YEARS. PRODUCTION OF HALON 1301, WIDELY USED IN SHIP AND AIRCRAFT FIREFIGHTING SYSTEMS, WILL NOT BE AUTHORIZED AFTER 1993 WITHOUT SPECIFIC FEDERAL AND INTERNATIONAL APPROVAL. STEPS ARE BEING TAKEN WITHIN DOD TO ESTABLISH A RESERVE OF ODS FOR MISSION CRITICAL APPLICATIONS, BUT ODS CONSERVATION BY OPERATIONAL COMMANDS WILL ALSO BE ABSOLUTELY IMPERATIVE. EVERY EFFORT WILL BE MADE TO ELIMINATE UNNECESSARY ODS EMISSIONS AND TO CAPTURE AND RECYCLE ODS WHEN PERFORMING MAINTENANCE. TECHNICAL GUIDANCE WILL BE FORTHCOMING.

C. ENHANCED ENVIRONMENTAL ENFORCEMENT. IN RECENT YEARS, BOTH THE FEDERAL ENVIRONMENTAL PROTECTION AGENCY (EPA) AND MANY STATES HAVE SUBSTANTIALLY INCREASED THEIR ENFORCEMENT STAFFS. WITH THE OCTOBER 1992 ENACTMENT OF THE FEDERAL FACILITIES COMPLIANCE ACT, THE STATES WERE GRANTED INCREASED AUTHORITY TO PENALIZE FEDERAL INSTALLATIONS FOR HAZARDOUS WASTE VIOLATIONS. PER DOD GUIDANCE, PENALTIES RELATING TO ROUTINE FUNCTIONS SUCH AS MANIFESTING, TRAINING, RECORDS MAINTENANCE, AND HOUSEKEEPING MUST BE PAID FROM INSTALLATION OPERATIONAL ACCOUNTS, THEREBY DIMINISHING THE DOLLARS AVAILABLE FOR OTHER NECESSARY FUNCTIONS. OUR BEST DEFENSE IS A GOOD OFFENCE. TAKE THE TIME AND COMMIT THE NECESSARY RESOURCES TO IMPROVE TRAINING AND PROCEDURES SO AS TO AVOID VIOLATIONS. AFTER-THE-FACT DAMAGE CONTROL, PARTICULARLY WHERE PENALTIES ARE INVOLVED, WILL BE CONSIDERABLY MORE EXPENSIVE THAN PROACTIVE STEPS TO REMAIN IN COMPLIANCE.

4. CNO ENVIRONMENTAL INITIATIVES. NAVY HAS TAKE A NUMBER OF STEPS IN RECENT MONTHS TO IMPROVE OUR ENVIRONMENTAL PERFORMANCE. AMONG THESE ARE:

A. ENVIRONMENTAL LEADERSHIP. IN VIEW OF THE INCREASING OPERATIONAL-ENVIRONMENTAL INTERFACE, IN AUGUST 1992, A LINE FLAG OFFICER WAS ASSIGNED TO LEAD NAVY'S ENVIRONMENTAL COMPLIANCE PROGRAM. AS A FORMER COMMANDER AND REGIONAL ENVIRONMENTAL COORDINATOR, HE SHARES YOUR CONCERNS AND WILL ENSURE EFFECTIVE COORDINATION BETWEEN OPERATIONAL AND SUPPORTING COMMANDS IN CARRYING OUT OUR ENVIRONMENTAL RESPONSIBILITIES.

B. ENVIRONMENTAL MANAGEMENT. ENVIRONMENTAL EXCELLENCE REQUIRES CONTINUING ATTENTION FROM NAVY'S TOP LEADERSHIP. IN SEPTEMBER 1992, THE DCNO (LOGISTICS) ESTABLISHED AND ASSUMED CHAIRMANSHIP OF THE NAVY ENVIRONMENTAL PROTECTION PROGRAM QUALITY MANAGEMENT BOARD (QMB). QMB MEMBERSHIP INCLUDES DEPUTY FLEET COMMANDERS AND VICE COMMANDERS OF SUPPORTING SYSTEMS COMMANDS. THE QMB'S MAJOR OBJECTIVES ARE TO IDENTIFY WAYS TO IMPROVE NAVY COMPLIANCE, TO ACCELERATE AND REDUCE THE COST OF CLEANUP AND TO ENHANCE OUR NATURAL AND CULTURAL RESOURCE STEWARDSHIP. I WANT THE QMB TO BE A VIABLE CONDUIT FOR IDEAS UP AND DOWN, AND ACROSS NAVY CHAINS OF COMMAND. IT IS ALSO A FORUM FOR OBJECTIVE AND CREATIVE BIG-PICTURE THINKING IN THE ENVIRONMENTAL AREA. BE SURE YOUR CHAIN OF COMMAND IS AWARE OF GENERAL INTEREST ITEMS FROM YOUR AREA OF RESPONSIBILITY (AOR).

C. NAVY/LEGISLATIVE/REGULATORY INTERFACE. THE BUSINESS OF NATIONAL DEFENSE IS SUBSTANTIALLY DIFFERENT FROM THAT OF COMMERCIAL INDUSTRY, WITH WHICH LAWMAKERS AND REGULATORS ARE GENERALLY MORE FAMILIAR. TO THE EXTENT THAT THESE DIFFERENCES MAKE NAVY COMPLIANCE WITH GENERAL STANDARDS IMPRACTICABLE OR IMPOSSIBLE, IN FAIRNESS, THE LAW OR REGULATION SHOULD MAKE ALLOWANCE FOR MILITARY UNIQUENESS. IN GENERAL, APPROPRIATE CONSIDERATION HAS BEEN GIVEN WHEN NAVY INTEREST HAVE BEEN EFFECTIVELY COMMUNICATED TO LAWMAKERS OR REGULATORS IN A TIMELY MANNER. TO FOCUS THESE EFFORTS AT THE NATIONAL LEVEL, IN 1992 AN ENVIRONMENTAL LEGISLATIVE AND REGULATORY INITIATIVES (ELRI) PROCESS ACTION TEAM (PAT) WAS CREATED, CHAIRED BY N45. SOME OF THE MANY ELRI AGENDA ITEMS FOR 1993 ARE:

(1) LEGISLATION ADDRESSING NAVY SHIP PLASTICS AND SOLID WASTE MANAGEMENT REQUIREMENTS, AS DISCUSSED IN PARAGRAPH 3A ABOVE.

(2) AMENDMENT TO THE CLEAR WATER ACT, ALLOWING DEVELOPMENT OF NATIONWIDE DISCHARGE STANDARDS FOR NAVY SHIPS REPLACING INCONSISTENT STATE REQUIREMENTS. INTERIM POLICY REGARDING STATE REGULATION OF SHIP DISCHARGES IS FORTHCOMING.

(3) DEVELOPMENT OF BASEL CONVENTION IMPLEMENTING LEGISLATION WHICH WILL ALLOW DOD OVERSEAS INSTALLATIONS TO DISPOSE OF OR RETROGRADE HAZARDOUS WASTE PROPERLY AND EFFICIENTLY.

(4) PARTICIPATION IN THE DEVELOPMENT OF STATUTES AND REGULATIONS REGARDING DREDGING AND DREDGED MATERIAL DISPOSAL TO PROTECT VITAL NAVY INTERESTS.

WHILE THE ELRI PAT MONITORS ENVIRONMENTAL ACTIVITY AT THE NATIONAL LEVEL, STATE ENVIRONMENTAL COORDINATORS THROUGHOUT THE NATION ARE GETTING A NAVY OAR IN THE WATER REGARDING STATE LAWS AND REGULATIONS. STATE ENVIRONMENTAL COORDINATORS NEED THE SUPPORT OF ALL COMMANDS WITHIN THEIR RESPECTIVE AOR TO ENSURE THAT SUPPORTABLE AND CONVINCING NAVY POSITIONS ON DRAFT LEGISLATION AND REGULATIONS ARE DEVELOPED.

5. ACTION. NAVY ENVIRONMENTAL SUCCESS REQUIRES ACTION FROM EVERY ECHELON OF COMMAND. I ASK THAT DURING 1993, YOU DEVOTE SPECIFIC ATTENTION TO THE FOLLOWING AREAS:

A. COMMUNICATE AND COOPERATE WITH REGIONAL/STATE ENVIRONMENTAL COORDINATORS. THEY ARE THE FOCAL POINT FOR ENSURING CONSISTENCY, PROMULGATING INFORMATION, AND INTERFACING WITH THE PUBLIC IN ENVIRONMENTAL MATTERS. THE REGIONAL AND STATE ENVIRONMENTAL COORDINATION SYSTEM, OUTLINED IN REF A, HAS ENABLED NAVY TO MAKE SIGNIFICANT STRIDES IN THE ENVIRONMENTAL AREA OVER THE PAST TWO YEARS. IN AN EFFORT TO FURTHER IMPROVE THE PROCESS, THE CNO ENVIRONMENTAL QMB RECENTLY COMMISSION A PROCESS ACTION TEAM, HEADED BY LANTFLT, TO REVIEW NAVY EXPERIENCE THUS FAR AND RECOMMEND IMPROVEMENTS IN ENVIRONMENTAL COORDINATION. IN THE MEANTIME, NAVY LEADERS NEED TO BE FAMILIAR WITH REF A REQUIREMENTS AND FULLY SUPPORT THEIR COGNIZANT REGIONAL AND STATE ENVIRONMENTAL COORDINATORS.

B. DOCUMENT YOUR RESOURCE REQUIREMENTS. ONE OF THE PERSISTENT PROBLEMS ENCOUNTERED IN NAVY'S ENVIRONMENTAL PROGRAM IS THE DIFFICULTY OF PRECISELY QUANTIFYING OUR COMPLIANCE COSTS. ACCURATE, SUPPORTABLE INFORMATION ON THESE COSTS IS ABSOLUTELY ESSENTIAL TO ENSURE THAT NAVY, AS A WHOLE, AND EACH SUBORDINATE ECHELON OF COMMAND, RECEIVE AN APPROPRIATE SHARE OF AVAILABLE RESOURCES. NAVY COMMANDS MUST TAKE SPECIAL CARE TO DOCUMENT THEIR ENVIRONMENTAL RESOURCE REQUIREMENTS FULLY AND ACCURATELY, AND THE ACTUAL UTILIZATION

OF RESOURCES PROVIDED. SOLID INFORMATION WILL HELP ENSURE THAT APPROPRIATE PRIORITY IS GIVEN THESE REQUIREMENTS AS BUDGET DECISIONS ARE MADE AT HIGHER ECHELONS OF COMMAND. ADDITIONALLY, THOROUGH DOCUMENTATION OF ENVIRONMENTAL REQUIREMENTS DEMONSTRATES A CONSCIENTIOUS COMPLIANCE EFFORT WHICH HELPS MINIMIZE THE POSSIBILITY OF ENVIRONMENTAL PERSONAL LIABILITY.

C. ENHANCE NATURAL AND CULTURAL RESOURCES. DUE TO PRUDENT LAND USE AND LONGSTANDING REQUIREMENTS FOR BUFFER ZONES, MANY NAVAL INSTALLATIONS NOW INCLUDE SIGNIFICANT ECOLOGICAL AND CULTURAL RESOURCES. THIS AFFORDS NAVAL INSTALLATIONS AN IDEAL OPPORTUNITY TO MAKE SIGNIFICANT CONTRIBUTIONS TO REGIONAL BIOLOGICAL DIVERSITY, SPECIES PROTECTION, AND CULTURAL AWARENESS WITHOUT ADVERSE IMPACT ON THE INSTALLATION MISSION. NATURAL AND CULTURAL RESOURCES ENHANCEMENTS ARE HIGHLY VISIBLE AND RELATIVELY INEXPENSIVE MEANS OF DEMONSTRATING NAVY'S COMMITMENT TO THE ENVIRONMENT. I URGE EVERY INSTALLATION COMMANDER TO TAKE A LOOK AT WHAT CAN BE DONE IN THIS AREA.

D. PROMOTE INSTALLATION RESTORATION. SINCE 1980, NAVY HAS BEEN IDENTIFYING, CHARACTERIZING, AND CLEANING UP HAZARDOUS SUBSTANCE CONTAMINATION AT NAVY FACILITIES THROUGH THE INSTALLATION RESTORATION (IR) PROCESS. THE PROCESS IS COMPLEX AND TIME CONSUMING, AND REQUIRES SUBSTANTIAL INTERFACE BETWEEN THE NAVY, REGULATORS, AND THE LOCAL COMMUNITY. ALTHOUGH THE NAVAL FACILITIES ENGINEERING COMMAND EXERCISES PRIMARY PROGRAM MANAGEMENT AUTHORITY IN THIS AREA, INSTALLATIONS ALSO PLAY AN IMPORTANT ROLE. INSTALLATION STAFF MUST KEEP ABREAST OF CLEANUP STATUS AT THEIR INSTALLATIONS AND PARTICIPATE IN CLEANUP PRIORITIZATION. COMMANDING OFFICERS SHOULD BE KNOWLEDGEABLE REGARDING THEIR PROGRAM AT THEIR INSTALLATIONS AND PLAY AN ACTIVE PART IN INVOLVING THE AFFECTED COMMUNITY, BOTH INSIDE AND OUTSIDE THE FENCE LINE.

E. FULLY CONSIDER ENVIRONMENTAL IMPACTS. ACTIONS WHICH COULD SIGNIFICANTLY AFFECT THE ENVIRONMENT, INCLUDING FOR EXAMPLE, THE CONDUCT OF NAVAL EXERCISES, MAY REQUIRE ENVIRONMENTAL STUDY UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA). ALLEGED NEPA NONCOMPLIANCE HAS SOMETIMES BEEN A BASIS FOR LITIGATION AGAINST NAVY AND HAS RESULTED IN DELAY AND DISRUPTION OF OUR OPERATIONS. IT IS VERY IMPORTANT THAT NEPA REQUIREMENTS BE CAREFULLY CONSIDERED IN THE EARLY PLANNING STAGES OF ANY MAJOR ACTION. NEPA COMPLIANCE WILL FACILITATE OUR GOAL OF ENVIRONMENTAL SOUND MISSION ACCOMPLISHMENT AND

WILL ENSURE THAT OUR ACTIONS PASS MUSTER IN THE EVENT OF LEGAL CHALLENGE.

F. PUBLICIZE YOUR SUCCESSES. NAVY COMMANDS AND INDIVIDUALS REGULARLY ACHIEVE IMPRESSIVE ENVIRONMENTAL SUCCESSES IN NATURAL RESOURCE MANAGEMENT, ENVIRONMENTAL PLANNING, HAZARDOUS WASTE MINIMIZATION, RECYCLING, INSTALLATION RESTORATION, AND OTHER AREAS. TOO OFTEN, NAVY'S ENVIRONMENTAL ACHIEVEMENTS ARE NOT FULLY UNDERSTOOD OR APPRECIATED BY THE PUBLIC. AN EFFECTIVE, AGGRESSIVE ENVIRONMENTAL PUBLIC INFORMATION SYSTEM BUILDS NAVY CREDIBILITY, WHICH AS A BENEFICIAL SPILLOVER EFFECT INTO OTHER OPERATIONAL AREAS. IN ORDER TO ENSURE YOUR SUCCESS STORIES ARE MARKETING PROPERLY AND TO THE MAXIMUM EXTENT TO NATIONAL AND REGIONAL MEDIA, THEY SHOULD BE SUBMITTED TO THE NAVY DEPARTMENT'S OFFICE OF INFORMATION (CHINFO). LOCAL PAO'S WILL BE AVAILABLE TO ASSIST IN CRAFTING STORIES AND RELEASES. CHINFO SHOULD ALSO BE ADVISED IMMEDIATELY WHEN THERE IS MEDIAL INTEREST IN A POSITIVE OR NEGATIVE ENVIRONMENTAL STORY OR WHEN AN ENVIRONMENTAL INCIDENT OCCURS.

6. THE ENVIRONMENTAL CHALLENGES FACING OUR NATION AND NAVY ARE IMMENSE. MEETING THEM WILL REQUIRE A GENUINE COMMITMENT TO ENVIRONMENTAL EXCELLENCE IN ALL FACETS OF NAVAL OPERATIONS. EFFORT ABOVE AND BEYOND COMPLIANCE WITH TODAY'S STANDARDS IS OUR ONLY PRUDENT ALTERNATIVE. NAVY HAS CHARTED A SOUND COURSE, ASSEMBLED AN ABLE WATCH TEAM, AND IS MAKING STEADY HEADWAY. I ASK YOUR CONTINUED SUPPORT AND ATTENTION TO THIS VITAL ENDEAVOR.

7. RELEASED BY ADM F.B. KELSO, II.//

|N45J

|N45/N4/N44/NCC/SC



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
WASHINGTON, D.C. 20380-0001

IN REPLY REFER TO:
CMC-LFL/CL
2 Mar 94

WHITE LETTER NO. 2-94

From: Commandant of the Marine Corps
To: All General Officers
All Commanding Officers
All Officers in Charge

Subj: ENVIRONMENTAL COMPLIANCE

1. The Marine Corps must comply with Federal, state, and local environmental requirements in the same manner as industries and citizens. The President's support for this concept is demonstrated in his recent order that Federal agencies begin complying with the Emergency Planning Community Right-to-Know Act and pollution prevention goals in 1994.

2. While installation commanders are at the fore of this compliance effort, I expect every commander who resides or trains on an installation to actively support that installation commander's environmental compliance and protection programs. All Marine commanders should emphasize environmental awareness and incorporate environmental compliance into every aspect of how they conduct business, taking affirmative steps to make compliance happen.

3. The Marine Corps cannot afford the cost of environmental inattention. In this era of constrained resources, every dollar spent to pay for fines or litigation costs resulting from noncompliance is one less dollar available to train our Marines. Avoidable violations such as record-keeping and house-keeping mistakes must be eliminated. Long-term strategies and plans must be developed to address major deficiencies. Wise expenditures on pollution prevention can save ten times that amount in future environmental management costs. Units responsible for violations must pay any resulting fines.

4. We have made real progress toward environmental compliance. With your personal attention and leadership, we can still do more. The Marine Corps must meet the challenge of training our Marines while preserving the natural and cultural resources entrusted to us. In meeting this goal, failure to achieve environmental compliance is simply not an option.

/s/ *C. E. Mundy Jr.*
C. E. MUNDY, JR.

CHAPTER II

**SOVEREIGN IMMUNITY, PREEMPTION, AND
THE UNITARY EXECUTIVE DOCTRINE**

FEDERAL AGENCIES AS REGULATED ENTITIES

0201 REFERENCES

- A. U.S. Const. art. VI

APPENDIX

- (A) Waivers of sovereign immunity in the major environmental statutes

0202 SCOPE. This chapter describes certain fundamental doctrines that make the relationship between Federal agencies and Federal, state, and local government regulators different than those for the rest of the regulated community. This chapter covers sovereign immunity, Federal supremacy, the unitary executive doctrine, and distinguishes these doctrines from preemption. This chapter is closely related to Chapter 3, which describes problems with enforcement as well as some of the documents and provisions used to define an installation's requirements in the effort to accommodate the unique characteristics of Federal agencies as regulated entities. This chapter is also closely related to Chapter 4, which deals with fee / tax issues that arise when state and local governments levy financial assessments in connection with environmental programs.

0203 BACKGROUND. As a general rule, the U.S. Government may not be sued by individuals or other governmental entities. This concept that the sovereign is immune from suit has its historical antecedents in the English notion that the King could do no wrong. In similar fashion, the United States as sovereign may not be sued without its consent. In the environmental context, the term "sovereign immunity" is often used in a broader sense that includes the doctrine of Federal supremacy guaranteed by article VI of the Constitution. Federal supremacy generally ensures that state and local governments cannot hinder essential government

functions. In the environmental law area, however, both Federal sovereign immunity from suit and Federal supremacy have been greatly eroded.

0204 FREEDOM FROM STATE REGULATION

A. Under the Supremacy Clause of article VI, the Constitution and the laws made pursuant thereto are the supreme law of the land. As a result, the activities of the Federal Government are generally free from regulation by any state. States may regulate federal activities only when, and only to the extent, that regulation is clearly and unambiguously authorized by Congress. See *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. 1627 (1992) (no waiver under Resource Conservation and Recovery Act (RCRA) or Clean Water Act (CWA) for retrospective penalties); *Hancock v. Train*, 426 U.S. 167, 179 (1976) (under the Clean Air Act (CAA), Congress had waived sovereign immunity as to substantive requirements but not procedural requirements); *Mayo v. United States*, 319 U.S. 441, 445 (1943). Freedom of the national government from regulation by the individual states was one of the factors that distinguished the Articles of Confederation from the Constitution. From the first years under the Constitution, it was recognized that state regulation of Federal functions could destroy its ability to govern effectively. See generally *McCulloch v. Maryland*, 4 Wheat 316, 4 L. Ed. 579 (1819) (national bank not subject to state regulation). The Court observed there that: "It is the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence." *Id.* at 427.

B. Despite the continuing vitality of Federal supremacy in most areas of the law, one prominent feature of environmental law has been the progressively broader waivers of sovereign immunity. After the Court held in *Hancock v. Train* that Congress had not waived sovereign immunity for procedural requirements (so that Federal agencies did not have to obtain state permits), it took Congress only a year to clarify matters by amending section 118 of the CAA (42 U.S.C. § 7418) to provide that the waiver applied to "any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever." See Pub. L. No. 95-95, § 116, 91 Stat. 685, 711 (1977)). A companion holding in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 227 (1976)—that the existing waiver in section 313 of the CWA (33 U.S.C. § 1323) did not include procedural requirements—was likewise overruled legislatively when Congress amended section 313 of the CWA. See Pub. L. No. 95-217, § 61(a), 91 Stat. 1566, 1598 (1977). Congress made it clear that the waiver extended to procedural requirements. Congress also included a waiver as to procedural requirements in RCRA very shortly after *Train* was decided. See Pub. L. No. 94-580, § 6001, 90 Stat. 2795, 2821 (1976). In 1992, after the Court in *U.S. Dept. of Energy v. Ohio* held that the waiver of

sovereign immunity in RCRA was not clear enough to allow state administrative assessment of penalties for past violations, it took Congress only six months to broaden the waiver to include such penalties. See Federal Facilities Compliance Act (FFCA), Pub. L. 102-386, § 101, 106 Stat. 1505 (1992), *codified at* 42 U.S.C. § 6961.

C. Counsel cannot, however, assume that Congress has waived sovereign immunity without careful analysis. Many of the waiver provisions are similar—but not identical—and the devil is in the details. Individual state requirements also differ widely. Courts continue to reject state claims that Congress created blanket waivers of all sovereign immunity. Compare *State of Maine v. Navy*, 702 F. Supp. 322, 330-31 (D. Me. 1988) (waiver as to "all" requirements" included requirement for fees) with *State of Maine v. Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992) (unreasonable assessments for generation of hazardous waste are not "requirements" under RCRA waiver of sovereign immunity). When analyzing waivers of sovereign immunity, several benchmarks are important.

1. Only Congress can waive sovereign immunity. See *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. at 1639; *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Despite arguments of countless state attorneys to the contrary, executive orders, failure to object to state regulation, compliance agreements, and individual actions of base commanders (past and present) are equally ineffective as waivers of sovereign immunity.

2. Waivers of sovereign immunity cannot be implied; they must be unequivocally expressed. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Unless the text of a waiver is clear and unambiguous as to a state requirement, it is not effective. Recent Supreme Court opinions stress that, generally, legislative history cannot be used to make an ambiguous textual waiver clear enough to pass muster. See *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992) (clarity required for unmistakable expression of waiver of sovereign immunity can not be supplied by committee report); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (rejecting use of legislative history to find unmistakably clear waiver of Eleventh Amendment). The importance of the *Dellmuth* line of cases can be seen in the implications that *U.S. Dept. of Energy v. Ohio* has on the issue of whether section 118 of the CAA waives sovereign immunity for administrative penalties. The legislative history of section 118 of the CAA is especially striking:

The amendment is also intended to resolve any questions about the sanctions to which noncomplying federal agencies, facilities, officers, employees, or agents may be subject. The applicable sanctions are to be the same for Federal facilities and personnel as for privately-owned pollution sources and for the owners and operators thereof. This means that Federal facilities and agencies may be

subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), to **civil or criminal penalties**, and to delayed compliance penalties.

See H.R. Rep. No. 294, 95th Cong., 1st Sess. 199, 200, *reprinted in* 1977 U.S. Code Cong. & Admin News 1077, 1279 (emphasis supplied).

However, the language of section 313 of the CWA that the *Ohio* Court found to be insufficient to waive sovereign immunity for administrative penalties is virtually identical to the language in section 118 of the CAA respecting penalties. Under *Dellmuth* and *Nordic Village*, a court never reaches the legislative history because, if the text is ambiguous enough to warrant resort to legislative history, it is too ambiguous to waive sovereign immunity. This is not to say that resort to legislative history is entirely dead however. In *State of Maine v. Navy*, 973 F.2d 1007, 1010-11 (1st Cir. 1992), even though the court ultimately relied on *U.S. Dept. of Energy v. Ohio*, it considered legislative history to turn aside the state's claim that section 120 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) waived sovereign immunity for penalties on handling hazardous waste.

3. Even where there are compelling policy reasons for a broader waiver, courts must strictly construe the text in favor of the United States and should not infer waiver where Congress has not expressly provided one. See *Library of Congress v. Shaw*, 478 U.S. 310, 318-21 (1986) (strictly construing the waiver of sovereign immunity to exclude attorneys fees from "costs" under the Civil Rights Act of 1964); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983) (waiver of sovereign immunity with regard to award of attorney fees under CAA should not be enlarged beyond what fair reading of the language requires). What constitutes ambiguity varies, but the Court has found that the existence of two plausible readings indicates that a purported waiver is ambiguous. See *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992); *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. at 1639.

4. Determining whether a Federal agency is subject to a state requirement cannot end with analysis of the dedicated Federal facility provision, however. By its analysis of other provisions of both RCRA and the CWA — especially the citizen suit provisions — the Court in *U.S. Dept. of Energy v. Ohio* indicated that a court must consider other provisions to determine if they provide the clear, unambiguous waiver that is required. Cf. *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. at 1633-35. Although the Court found no such waiver, the implications of the analysis are clear.

D. Analysis of sovereign immunity is not necessary in all environmental cases. The first inquiry must always be whether, under the terms of the statute or regulation, the requirement is applicable to the Federal agency concerned. For example, Federal agencies may not be included because the requirement in the

Federal law only applies to a "person," which is defined in such a way that Federal agencies are not included. Even if the Federal law provides that Federal agencies are persons, the state law in question may by its own terms not include Federal agencies as a "person" subject to regulation. For Federal environmental statutes, if the statute is applicable to a Federal agency, no sovereign immunity is required because Federal agencies are as susceptible to Federal laws as private individuals. Many environmental laws have requirements that *only* operate on Federal agencies. See National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (obligation to prepare environmental impact statement (EIS)); Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2) (obligation to insure actions will not jeopardize endangered species).

0205 FREEDOM FROM SUIT. The immunity of the Federal Government from suit can only be overcome by the consent of Congress. See *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (statute of limitations included in waiver precluded suit by state); *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). Waiver of sovereign immunity is a jurisdictional prerequisite that can be raised at any time or even by the court sua sponte. See *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Although immunity from suit is so fundamental that it must be considered in every case, in the environmental area, Congress has provided potential litigants with a number of ways to bring suit against Federal agencies. Environmental statutes deal with Federal agencies' immunity from suit in several ways. First, the same waiver provision that makes Federal agencies subject to substantive standards usually makes Federal agencies subject to judicial sanctions to enforce the standards. For example, section 118 of the CAA both makes agencies subject to standards and allows regulators to go to court to enforce them:

Each department . . . of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply . . . to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

42 U.S.C. § 7418 (emphasis added).

Most environmental statutes also include provisions that allow private citizens to bring civil suits to force both regulators and the regulated community to comply with the law. For example, section 304 of the CAA provides:

[A]ny person may commence a civil action on his own behalf --

- (1) ***against any person*** (including (i) ***the United States . . .***) ***who is alleged to be in violation*** of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,
- (2) ***against the Administrator*** where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or
- (3) ***against any person*** who . . . constructs any new or modified major emitting facility without a permit . . . or who is alleged to be in violation of any condition of such permit.

42 U.S.C. § 7604 (emphasis added).

Even where an environmental statute does not include a specific provision that permits suit, it may be structured so that various Federal actions undertaken under the statute are subject to judicial review under section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702. For example, because the NEPA, 42 U.S.C. § 4332(2)(C), provides that a proposal for a major Federal action that significantly affects the environment must include an EIS, a decision to proceed with a proposal without such a statement can be challenged under the APA. See *generally Valley Citizens for a Safe Environment v. Aldridge*, 886 F.2d 458 (1st Cir. 1989). Likewise, a decision to proceed with a Federal action that affects a water or land use or a natural resource of a federally approved coastal zone plan without first making a consistency determination under the Coastal Zone Management Act (CZMA) can be reviewed. See *generally Marquez-Colon v. Reagan*, 668 F.2d 611, 614 (1st Cir. 1981) (refugee camp could proceed after Puerto Rico determined it would be consistent).

0206 FEDERAL PREEMPTION DISTINGUISHED. Occasionally the doctrine of preemption arises in environmental cases. More frequently, cases dealing in preemption are confused with cases dealing with sovereign immunity. Preemption

is a doctrine that prevents or limits the application of state law to an issue. It applies whether the regulated entity is a Federal agency or a private citizen. In a field where states have traditionally exercised police powers, preemption analysis must start with the assumption that the Federal law does not supersede state law unless that was the clear and manifest purpose of Congress. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The three preemption theories that arise most frequently are:

A. ***Where Federal law occupies the field so that there is no room for state law.*** *See Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2486 (1991) (Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulation of pesticides was not so pervasive that local governments could not regulate their use).

B. ***Where Congress has expressly excluded any inconsistent state legislation.*** *See Jones v. Rath Packing Co.*, 430 U.S. 519, 530 (1977) (Congress specifically barred inconsistent labeling requirements). Two rare and limited examples in environmental law include section 233 of the CAA, which expressly precludes inconsistent state regulation of emissions from aircraft, and section 312(f) of the CWA, which precludes state legislation regulating the design, manufacture, installation, and most uses of marine sanitation devices.

C. ***Where the state law and Federal law are in direct conflict.*** *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (California standards for avocados could be stricter than Federal standards). Although this might seem to be a frequent occurrence, courts are very reluctant to find conflicts — especially in environmental laws. Where it is theoretically possible for the regulated entity to comply with both Federal and state requirements, courts are unlikely to find preemption. *Id.* If a court's view of the facts overlooks practical conflicts or assumes that different technical requirements can be reconciled, it will not find any reason to overcome the presumption against preemption. *Cf. United States v. Colorado*, 990 F.2d 1565, 1580-83 (10th Cir. 1993), *cert. denied* 114 S.Ct. 922 (1994) (lack of conflict between Army CERCLA remediation plan and state RCRA clean up).

Thus, courts approach preemption issues opposite to the way they deal with waivers of sovereign immunity. Preemption challenges have far less vitality than those based on sovereign immunity. In the environmental area, many Federal statutes have express provisions against preemption of state laws (which counsel for the state will occasionally try to cite as waivers of sovereign immunity). *See, e.g.*, 33 U.S.C. § 1370 (CWA does not preempt stricter state laws); 33 U.S.C. § 1321(o) (section 311 of CWA does not preempt local laws respecting discharge of oil or hazardous substances to waters of the state); 42 U.S.C. § 6929 (RCRA does not preempt stricter state laws on hazardous waste); 42 U.S.C. § 6991(g) (RCRA does not preempt stricter state laws on underground storage tanks); 42 U.S.C. § 7416 (with

exception of provisions on moving sources and certain others, CAA does not preempt state clean air standards); 42 U.S.C. § 9614(a) (CERCLA does not preempt additional liability under state law for hazardous substances). Finally, one provision, yet to be authoritatively construed, is a hybrid that certainly protects state laws from preemption and arguably waives sovereign immunity. See 33 U.S.C. § 1344(t) (state dredge and fill regulations).

0207 UNITARY EXECUTIVE DOCTRINE. The unitary executive doctrine is not a direct factor in Federal-state relations, but it can have important ramifications in relations among Federal agencies because it limits the enforcement mechanisms available to Federal regulators. The unitary executive doctrine recognizes that Federal agencies were created by Congress for unique missions that lack parallels in private industry, are dependent on Congressional action for funding, and all serve the President. Although it received greater attention in years past, it remains a factor when dealing with Federal regulators.

A. In the administrative context, the implications of the unitary executive doctrine are that, absent specific authorization, Federal agencies respect the decisions and authority of other agencies, but are not subject to their orders because the head of each department serves at the pleasure of the President. It is the President who is constitutionally responsible under Article II to ensure that the laws are faithfully executed. This supervisory power was intended by the Framers to be exercised in a "unitary and uniform" manner." See *Myers v. United States*, 272 U.S. 52, 135 (1926). Debates over the Constitution emphasized that, unlike a cabinet or similar arrangement, authority and responsibility in the executive branch would be vested in one individual. If one agency could sue another or unilaterally order it to take a particular action without the prior opportunity to contest the order within the executive branch, the President is deprived of the opportunity to settle the matter.

B. This is manifested in two Executive orders that are relevant to environmental disputes. First, the dispute resolution provisions of Executive Order 12088 provide that, when disputes arise between EPA and Federal agencies over violation of pollution control laws, the Director of the Office of Management and Budget will resolve the issue. See sections 1-602 and 1-604, Executive Order 12088, Federal compliance with Pollution Control Standards (October 13, 1978). Second, legal disputes—including disputes over jurisdiction—between Federal agencies that cannot be resolved are to be referred to the Attorney General for resolution. See sections 1-401-02, Executive Order 12146, Management of Federal Land Resources (July 18, 1979).

C. Congress has specifically provided for EPA to exercise administrative order authority over other Federal agencies in some instances. See, e.g., CERCLA § 106, 42 U.S.C. § 9606(a) (EPA can issue administrative orders if there is an

imminent and substantial endangerment to public health); RCRA § 6001, 42 U.S.C. § 6961(b) (EPA can issue administrative orders whenever it would do so for a private entity). Even the landslide support behind the FFCA that amended section 6001, however, acknowledged the unitary executive doctrine by requiring that, before any penalty becomes final, Federal agencies have a right to consult with the Administrator in addition to the process rights of individuals. See 42 U.S.C. § 6961(b)(2).

D. In the litigation context, the unitary executive doctrine has constitutional dimensions. Article III requires that Federal courts only have jurisdiction of a "case or controversy." Because litigation solely between two Federal agencies would involve two parties, each serving a common superior with a constitutional duty to supervise each, it follows that there is really no case or controversy.

0208 FINES AND PENALTIES. Perhaps the greatest disputes over both waivers of sovereign immunity and the unitary executive doctrine involve attempts by regulators to impose fines and penalties on Federal agencies. This is a particularly dynamic area, where counsel must check the latest developments before providing any final advice. Legislation is pending to make Federal agencies subject to fines and penalties under many of these statutes. Whether or not Federal facilities are required to pay administrative fines assessed by a regulatory agency or civil penalties imposed by a court (other than penalties for contempt to enforce an earlier order) depends on the waiver language found in the respective statutes.

A. ***Federal civil penalties.*** Under the "unitary executive" doctrine, one part of the executive branch (EPA) cannot sue or seek civil penalties against another part of the executive branch (agencies) to encourage compliance with the law. There are exceptions, however.

1. If an Interagency Agreement (IAG) negotiated under section 120 of CERCLA (42 U.S.C. § 9620) covering cleanup of an National Priorities List (NPL) site includes a stipulated penalty provision, EPA can recover penalties. See 42 U.S.C. § 9622(l). The model IAG provides for stipulated penalties, and Navy policy is to pay valid penalties where a provision included in an IAG is violated and no alternative remedy exists. These are handled administratively.

2. Federal agencies are liable for civil penalties administratively imposed by EPA for violations of RCRA pursuant to specific congressional direction in section 102(a) of the FFCA, Pub. L. No. 102-386, 106 Stat. 1505 (1992), *codified at* 42 U.S.C. § 6961(a). Navy policy is to pay valid state or Federal penalties for violations occurring after October 6, 1992, the effective date of the FFCA. Commands should use established Federal administrative procedures to contest any penalties

imposed because of legal or factual errors on the merits. Because of the manner in which EPA assesses penalties, substantial reductions can often be negotiated or obtained through a hearing or protest process. Note that, although EPA still has no right to sue another Federal agency, failure to comply with such an order can be the subject of a citizen's suit under 42 U.S.C. § 6972. (RCRA Citizen Suit Provision).

3. EPA finalized its penalty policy for Federal agencies on July 6, 1993. See 58 Fed. Reg. 49044 (1993). The policy responds to the direction of Congress to treat Federal agencies just like any other "person." Accordingly, Federal agencies have the same right to a hearing and appeal. See H. Rep. No. 102-886, 102nd Cong., 2d Sess. 19 (1992). They can also expect EPA to issue a press release upon assessment of the penalty. Penalties can be contested through the administrative hearing process established by 40 C.F.R. part 22. These procedures provide for an administrative proceeding before an administrative law judge on the basis of a "complaint" filed by EPA. Proceedings are supposed to move quickly, including a requirement to file an answer to the complaint within 30 days. In practice, after the answer is filed, the administrative caseload, shortage of EPA counsel, and very real potential for a negotiated settlement in most cases means that cases move more slowly. The procedures are not applicable to orders under RCRA § 3008(h) (42 U.S.C. § 6928 (h)) for corrective action after release to protect human health or environment. See 40 C.F.R. part 24. In recognition of the unitary executive doctrine, after the initial determination and any appeal, a Federal agency has the additional right to consult with the Administrator of the EPA before the penalty becomes final. See 42 U.S.C. § 6961(b)(2). Pursuant to the President's signing statement, DOD has directed that penalties are to be paid from agency appropriations—not the Judgment Fund.

B. **State civil penalties.** As discussed at length, *supra*, attempts by states to impose civil penalties involve both supremacy clause and sovereign immunity questions. Penalty issues arise both in state administrative proceedings and in state enforcement actions brought in state and Federal court. Before *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. 1627 (1992), courts had found waivers of sovereign immunity not only in the various Federal facilities provisions, but also in the citizen suit provisions, arguing that, if the citizen suit provision allows recovery of civil penalties, and the state can bring a citizen suit, then government has waived sovereign immunity. Particular statutes are discussed below.

C. **State civil penalties under RCRA.** Navy policy is to pay valid state civil penalties imposed for violations occurring after October 6, 1992. As with Federal RCRA penalties, commands can challenge erroneous factual or legal determinations through the administrative process. State procedures vary widely. Some provide for a formal hearing process very similar to that used by EPA. Counsel should be familiar with the penalty policy and procedural provisions for their state. Note that section 102(b) of the FFCA requires that, except where barred by state laws or state

constitutions as of October 6, 1992, the proceeds of penalties from Federal facilities can only be used for environmental projects. See 42 U.S.C. § 6961(c).

D. **State civil penalties under CWA.** Navy policy is not to pay state civil penalties, whether sought administratively or from a court, for past violations of the CWA under the existing waiver of sovereign immunity.

1. Although section 313 (33 U.S.C. § 1323) provides that Federal facilities are subject to "any process and sanction, whether enforced in Federal, State, or local courts," that language does not include civil penalties but only subjects Federal facilities to the jurisdiction of state and local courts and coercive penalties used to enforce court orders. The waiver is also complicated by language that provides that the "United States shall be liable only for those civil penalties *arising under Federal law* or imposed by a State or local court to enforce an order or the process of such court." (emphasis added.)

2. Case law construing section 313 was mixed until resolved by the Supreme Court in *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. 1627 (1992). There, the Court reviewed a sixth circuit decision making Federal agencies liable for civil penalties. The sixth circuit considered a multifaceted argument. The court concluded that the waiver of sovereign immunity in section 313 was not clear with respect to civil penalties, but concluded that the citizen suit provision — section 505 (33 U.S.C. § 1365) — did waive sovereign immunity for civil penalties. Because the court also held that states could sue under the citizen suit provision, the effect was to allow state imposition of civil penalties. The Supreme Court reversed, holding that Congress has not clearly waived sovereign immunity for civil penalties in section 309 (33 U.S.C. § 1319) of the CWA because the section applies only to "persons," and the Department of Energy is not included within the general definition of person in section 502 (33 U.S.C. § 1362). See *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. 1627, 1634 (1992). Although Ohio argued that the state program had been "Federalized" when EPA approved it, the Court first cast serious doubt on the argument that the penalties arose under Federal law and then concluded that the textual language was too ambiguous to support any waiver.

3. The *U.S. Dept. of Energy v. Ohio* decision focused on retrospective penalties, leaving unanswered the question of whether the "process and sanctions" in section 313 waive sovereign immunity for predetermined, prospective penalties ordered by a court for future violations. The Department of Justice believes that the only clear waiver in section 313 is to "process and sanctions" that fall within the range of sanctions traditionally used to address contempt imposed after failure to obey a court order. These include monetary penalties.

4. Another CWA case, *Sierra Club v. Lujan*, shows the impact of *U.S. Dept. of Energy v. Ohio* on penalties clearly arising under Federal law. In the

decision below, the tenth circuit originally held that Federal agencies were liable for civil penalties under section 309 because they are "sanctions" under section 313. The court also relied on the fact that "person" is defined without reference to the United States in section 502, but that the definition of "person" in section 505, dealing with citizen suits, specifically includes the United States. See *Sierra Club v. Lujan*, 931 F.2d 1421, 1429 (10th Cir. 1991), *rev'd*, 112 S. Ct. 1927 (1992). Note that this was for violation of an **EPA** permit, so the "arising under federal law" issue did not exist. 931 F.2d at 1424. The Supreme Court granted certiorari, vacated the judgment, and remanded. *Sierra Club v. Lujan*, 112 S. Ct. 1927 (1992). After remand, the tenth circuit held that *U.S. Dept. of Energy v. Ohio* controlled, even though the permit in question here was issued by EPA and thus arose under Federal law. See *Sierra Club v. Lujan*, 972 F.2d 312, 316 (10th Cir. 1992).

E. **State civil penalties under the CAA.** Previous Navy policy was to negotiate clean air penalties down, label them "enforcement costs," then pay. After *U.S. Dept. of Energy v. Ohio*, this policy was changed because of the similarity between section 118 (42 U.S.C. § 7418) of the CAA and section 313 of the CWA and because of the emergence of the textual waiver theories heralded in *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992) and *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) discussed above.

1. Previous lower court decisions had found a waiver permitting penalties in several instances. In *Ohio v. Air Force*, 17 Env'tl. L. Rep. 21120 (S.D. Ohio 1987), the court held that section 118 waives sovereign immunity for civil penalties for violations of Ohio's air pollution regulations because "sanctions" includes penalties for regulatory violations. In *Alabama v. Veterans Administration*, 648 F. Supp. 1208 (M.D. Ala. 1986), the court held that citizen suits lie for past violations of asbestos emission standards. The court held that the state regulations were part of the "joint" Federal-state program. Finally, Comp. Gen. Decision B-194508, 58 Comp. Gen. 677 (1979) allowed use of appropriated funds to pay CAA penalties. The decision in *U.S. Dept. of Energy v. Ohio*, however, puts these decisions in severe jeopardy.

2. Until the sufficiency of any waiver of sovereign immunity for penalties under section 118 of the CAA is determined, current guidance is that attempts to assess civil penalties for CAA violations, whether administratively or judicially, should be discussed with the Regional Environmental Coordinator (REC) and then referred to the Office of Assistant General Counsel (OAGC)(Installations and Environment (I&E)) for a case-by-case determination. For practical reasons, penalties under \$500.00 imposed for violations of opacity standards may be negotiated and paid as enforcement costs without referral, although the REC should be kept informed. Referrals for other penalty assessments should include analysis whether the penalty is being imposed for violation of an emission standard or limitation under the CAA, violation of an EPA or state order with respect to such a

standard, or construction of a new or modified major emitting facility without the necessary permit.

F. State civil penalties under Safe Drinking Water Act (SDWA). Because the waiver provision in the SDWA, 42 U.S.C. § 300j-6, is essentially the same as the waiver in the CAA, the Navy guidance on whether penalties should be paid is also similar. Attempts to assess civil penalties for SDWA violations, whether administratively or judicially, should be discussed with the REC and then referred to OAGC(I&E) for a case-by-case determination. Referrals should include analysis whether the penalty is being imposed for violation of the SDWA. Note also that the waiver of sovereign immunity extends to facilities with drinking water systems as defined in the SDWA or facilities engaged in underground injection which endangers drinking water. See 42 U.S.C. § 300g.

0209 POINTS OF CONTACT. Questions on sovereign immunity form the stock in trade for environmental counsel assigned to Area Coordinators and, for the Marine Corps, Western Area Counsel Office (WACO) and Eastern Area Counsel Office (EACO). Environmental counsel at Naval Facilities (NAVFAC) Engineering Field Divisions (EFDs) are also familiar with these doctrines as are counsel at Office of Counsel, Naval Sea Systems Command (NAVSEASYSKOM). When questions cannot be resolved at those areas, the following additional points of contact are provided.

- A. Legal Counsel, Office of the Chief of Naval Operations (CNO) (N-45)
(703) 602-3028 DSN 332-3028
- B. Office of Counsel (Code CL), Headquarters Marine Corps
(703) 614-2150 DSN 224-2150
- C. OAGC (Installations and Environment)(I&E)
(703) 602-2252 DSN 332-2252

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APPENDIX A

I. CLEAN WATER ACT (CWA) WAIVER OF SOVEREIGN IMMUNITY

33 U.S.C. § 1323. Federal facilities pollution control.

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to

any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

[Remainder of provision omitted]

II. CLEAN AIR ACT (CAA) WAIVER OF SOVEREIGN IMMUNITY

42 U.S.C. § 7418. Control of pollution from Federal facilities.

(a) General compliance

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

(b) Exemption

The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 7411 of this title, and an exemption from section 7412 of this title may be granted only in accordance with

section 7412(i)(4) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. In addition to any such exemption of a particular emission source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

(c) Government vehicles

Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government shall comply with all applicable provisions of a valid inspection and maintenance program established under the provisions of subpart 2 of part D of this subchapter or subpart 3 of part D of this subchapter except for such vehicles that are considered military tactical vehicles.

(d) Vehicles operated on federal installations

Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government having jurisdiction over any property or facility shall require all employees which operate motor vehicles on the property or facility to furnish proof of compliance with the applicable requirements of any vehicle inspection and maintenance program established under the provisions of subpart 2 of part D of this subchapter or subpart 3 of part D of this subchapter for the State in which such property or facility is located (without regard to whether such vehicles are registered in the State). The installation shall use one of the following methods to establish proof of compliance.

(1) presentation by the vehicle owner of a valid certificate of compliance from the vehicle inspection and maintenance program;

(2) presentation by the vehicle owner of proof of vehicle registration within the geographic area covered by the vehicle inspection and maintenance program (except for any program whose enforcement mechanism is not through the denial of vehicle registration); and

(3) another method approved by the vehicle inspection and maintenance program administrator.

III. RCRA SOLID AND HAZARDOUS WASTE WAIVER OF SOVEREIGN IMMUNITY

§ 6961. Application of Federal, State, and local law to Federal facilities.

(a) In general

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal

or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

(b) Administrative enforcement actions

(1) The Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities contained in this chapter. The Administrator shall initiate an administrative enforcement action against such a department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person. Any voluntary resolution or settlement of such an action shall be set forth in a consent order.

(2) No administrative order issued to such a department, agency, or instrumentality shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator.

(c) Limitation on State use of funds collected from Federal Government

Unless a State law in effect on October 6, 1992, or a State constitution requires the funds to be used in a different manner, all funds collected by a State from the Federal Government from penalties and fines imposed for violation of any substantive or procedural requirement referred to in subsection (a) of this section shall be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.

IV. WAIVER OF SOVEREIGN IMMUNITY FOR UNDERGROUND STORAGE TANKS (USTs)

42 U.S.C. § 6991f. Federal facilities.

(a) Application of subchapter

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

(b) Presidential exemption

The President may exempt any underground storage tanks of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriations. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

(Pub.L. 89-272, Title II, s 9007, as added Pub.L. 98-616, Title VI, s 601(a), Nov. 8, 1984, 98 Stat. 3286.)

V. CERCLA WAIVER OF SOVEREIGN IMMUNITY

42 U.S.C. § 9620. Federal facilities.

(a) Application of chapter to Federal Government

(1) In general

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

(2) Application of requirements to Federal facilities. All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this chapter for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this chapter.

(3) Exceptions

This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods. This subsection shall also not apply to any requirements relating to bonding, insurance, or financial responsibility. Nothing in this chapter shall be construed to require a State to comply with section 9604(c)(3) of this title in the case of a facility which is owned or operated by any department, agency, or instrumentality of the United States.

(4) State laws

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List.

The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

[Remainder of provision omitted]

VI. SAFE DRINKING WATER ACT WAIVER OF SOVEREIGN IMMUNITY

42 U.S.C. § 300j-6. Federal agencies.

(a) Compliance with Federal, State, and local requirements, etc.; scope of applicability of compliance requirements, etc.; liability for civil penalties. Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 300h(d)(2) of this title) shall be subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty under this subchapter with respect to any act or omission within the scope of his official duties.

(b) Waiver; national security; records available in judicial proceedings; publication in Federal Register; notice to Congressional committees

The Administrator shall waive compliance with subsection (a) of this section upon request of the Secretary of Defense and upon a determination by the President that the requested waiver is necessary in the interest of national security. The Administrator shall maintain a written record of the basis upon which such waiver was granted and make such record available for in camera examination when relevant in a judicial proceeding under this subchapter. Upon the issuance of such a waiver, the Administrator shall publish in the Federal Register a notice that the waiver was granted for national security purposes, unless, upon the request of the Secretary of Defense, the Administrator determines to omit such publication because

the publication itself would be contrary to the interests of national security, in which event the Administrator shall submit notice to the Armed Services Committee of the Senate and House of Representatives.

[Remainder of provision omitted]

VII. WAIVER OF SOVEREIGN IMMUNITY FOR LOW-LEVEL RADIOACTIVE WASTE ACT

42 U.S.C. § 2021d. Regional compacts for disposal of low-level radioactive waste.

(a) In general

(1) Federal policy

It is the policy of the Federal Government that the responsibilities of the States under section 2021c of this title for the disposal of low-level radioactive waste can be most safely and effectively managed on a regional basis.

(2) Interstate compacts

To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(b) Applicability to Federal activities

(1) In general

(A) Activities of the Secretary

Except as provided in subparagraph (B), no compact or action taken under a compact shall be applicable to the transportation, management, or disposal of any low-level radioactive waste designated in section 2021c(a)(1)(B)(i)-(iii) of this title.

(B) Federal low-level radioactive waste disposed of at non-Federal facilities. Low-level radioactive waste owned or generated by the Federal Government that is disposed of at a regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact shall be subject to the same conditions, regulations, requirements, fees, taxes, and surcharges imposed by the compact commission, and by the State in which such facility is located, in the

Consolidated Environmental Law Deskbook

same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government.

(2) Federal low-level radioactive waste disposal facilities

Any low-level radioactive waste disposal facility established or operated exclusively for the disposal of low-level radioactive waste owned or generated by the Federal Government shall not be subject to any compact or any action taken under a compact.

(3) Effect of compacts on Federal law

Nothing contained in sections 2021b to 2021j of this title or any compact may be construed to confer any new authority on any compact commission or State --

(A) to regulate the packaging, generation, treatment, storage, disposal, or transportation of low-level radioactive waste in a manner incompatible with the regulations of the Nuclear Regulatory Commission or inconsistent with the regulations of the Department of Transportation;

(B) to regulate health, safety, or environmental hazards from source material, byproduct material, or special nuclear material;

(C) to inspect the facilities of licensees of the Nuclear Regulatory Commission;

(D) to inspect security areas or operations at the site of the generation of any low-level radioactive waste by the Federal Government, or to inspect classified information related to such areas or operations; or

(E) to require indemnification pursuant to the provisions of chapter 171 of Title 28, (commonly referred to as the Federal Tort Claims Act) [28 U.S.C.A s 2671 et seq.], or section 170 of the Atomic Energy Act of 1954 (42 U.S.C. 2210) (commonly referred to as the Price-Anderson Act), whichever is applicable.

(4) Federal authority

Except as expressly provided in sections 2021b to 2021j of this title, nothing contained in sections 2021b to 2021j of this title or any compact may be construed to limit the applicability of any Federal law or to diminish or otherwise impair the jurisdiction of any Federal agency, or to alter, amend, or otherwise affect any Federal law governing the judicial review of any action taken pursuant to any compact.

(5) State authority preserved

Except as expressly provided in sections 2021b to 2021j of this title, nothing contained in sections 2021b to 2021j of this title expands, diminishes, or otherwise affects State law.

[Remainder of provision omitted]

CHAPTER III

FEDERAL FACILITY COMPLIANCE

0301 REFERENCE

- A. *EPA Federal Facilities Compliance Strategy Manual*, November 1988 (The *Yellow Book*, pending revision)
- B. Executive Order 12088, Federal Compliance With Pollution Control Standards (October 13, 1978) (Reprinted at Appendix B of the *Yellow Book*)
- C. Executive Order 12146, Management of Federal Legal Resources (July 18, 1979) (Reprinted at Appendix B of the *Yellow Book*)
- D. 58 Fed. Reg. 49044, September 21, 1993, Federal Facility Compliance Act [EPA] Enforcement Authorities Implementation
- E. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22
- F. Rules Governing the Issuance of and Administrative Hearings on Interim Status [RCRA § 3008(h)] Corrective Action Orders, 40 C.F.R. Part 24
- G. EPA RCRA Civil Penalty Policy, October 1990, and applicable State Civil Penalty Policies
- H. EPA Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements, February 25, 1991, and applicable State Policies
- I. EPA Policy on the Use of Supplemental Enforcement Projects in EPA Settlements, February 12, 1991, and applicable State Policies

- J. Deputy Assistant Secretary of Defense (Environment) Memorandum dated December 17, 1992, Implementation of the Federal Facilities (sic) Compliance Act (FFCA) of 1992 [P.L. 102-386, October 6, 1992]
- K. Department of the Navy (DON) and EPA Interagency Agreement to reimburse EPA inspection costs under RCRA § 3007(c) (subject to annual renegotiation)
- L. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 1
- M. MCO P5090.2 Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 1

APPENDIX

- (A) Page 3, Attachment 4, Appendix K of EPA's *Federal Facilities Compliance Strategy Manual*, November 1988 (The Yellow Book, pending revision)

0302 SCOPE. Due to waivers of sovereign immunity in major environmental statutes, Federal facilities must generally comply to the same extent as nongovernmental entities. EPA's goal is to help ensure that Federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and municipal facilities. Because of the sovereign immunity and Federal supremacy implications of an EPA or state enforcement action, this chapter should be read in conjunction with Chapter 2, *Federal Agencies As Regulated Entities*. The principles addressed therein will assist in determining what enforcement options are available (criminal, civil, or administrative) to EPA or a state under the statute upon which the enforcement action is based and whether any violations are subject to monetary penalties.

A. *A separate strategy.* EPA does not have the same enforcement mechanisms available against Federal facilities as it does against the private sector. Under the "unitary executive principle," for example, EPA cannot sue other Federal agencies to enforce environmental statutes. This principle treats all Federal agencies as one entity. Thus, the intra-agency dispute does not present a judicial case or controversy. Similarly, EPA cannot assess fines or penalties, except under the Resource Conservation and Recovery Act (RCRA) as a result of the Federal Facility Compliance Act or as agreed to in advance through provisions for stipulated penalties in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Interagency Agreements (IAGs). Whether EPA can issue unilateral orders

against Federal agencies depends upon the language of the statute upon which the enforcement action is based. For example, under RCRA, an EPA order becomes final if not challenged administratively in accordance with 40 C.F.R. Part 22 procedures. In any event, these restrictions on EPA apply only to the Federal agency itself, not to contractors or private operators of government facilities.

B. **Strategy overview.** The primary features of EPA's Federal facility compliance strategy are: compliance promotion and technical assistance; compliance monitoring; and enforcement responses to violations. In addition, the strategy incorporates the state enforcement role in the overall effort to achieve compliance.

C. **Applicability.** The EPA compliance strategy applies to all Federal facilities. The definition of "Federal facility" includes: the Federal installation (including contiguous and noncontiguous property under the jurisdiction of the commanding officer (CO)); Government-Owned, Contractor-Operated (GOCO) facilities; government organizations located in facilities leased from private owners; government facilities leased to private operators for private use; and tenant activities on a military installation. Typically, EPA or a state will look to the installation CO as the official responsible for compliance and leave it to the CO, as an internal matter, to sort through responsibility for noncompliance with the commands and tenant activities on the installation.

0303 COMPLIANCE PROMOTION

A. **Environmental auditing policy.** EPA encourages all Federal agencies to adopt a formal audit program. Each service has done so. The Navy program, the Environmental Compliance Evaluation system, is discussed in Chapter 6 of this Deskbook.

B. **Technical assistance.** Executive Order 12088 charges EPA to provide advice and assistance to other Federal agencies. This mission is coordinated by the Regional Federal Facilities Coordinator, the primary point of contact at each region for Federal facility issues. EPA, however, does not view "technical assistance" as equivalent to assuming responsibility for the Federal facility's compliance program. Achieving and maintaining compliance remains the responsibility of the Federal facility.

C. **Other assistance.** EPA recommends appropriate training programs to assist Federal agencies in achieving and maintaining compliance. In addition, EPA maintains a number of "hotlines" to answer technical questions from the field and pass on useful regulatory information. The numbers are in the *Yellow Book* and discussed in pertinent chapters in this Deskbook. The numbers can also be obtained from each EPA region.

0304 COMPLIANCE MONITORING

A. **Objectives.** EPA reviews the compliance status of Federal facilities for potential violations. EPA collects evidence to support potential enforcement actions. In addition, this information will be analyzed to identify compliance patterns within Federal agencies.

B. **Information collection.** EPA collects information in a variety of ways. Periodic performance reporting yields routine information on predesignated topics. Recordkeeping requirements imposed by statute or regulation are also a fertile source of information. Many statutes and regulations require us to notify EPA of problems we encounter (e.g., spills or hazardous releases). When EPA knows in advance the type of data required, EPA can issue orders to produce the requested information. EPA's authority to issue orders requiring that information be produced is contained in the various media-specific statutes. See, e.g., RCRA § 3013. Federal facilities should comply with such EPA information requests after consultation with Regional Environmental Coordinator (REC) counsel and in accordance with existing laws and policies on the release of information. If the timelines in the information request cannot be met, an extension should be requested and confirmed in writing.

C. **Inspections.** The monitoring and information collection objectives are also served by EPA's inspection program. These inspections are usually coordinated with state regulators and may examine the full spectrum of environmental compliance issues. Exhibit V-1 in the *Yellow Book* lists the media program inspections EPA conducts. We generally grant EPA free access to our facilities, consistent with security clearance requirements. Paragraph 1-5.9 of OPNAVINST 5090.1A provides detailed guidance on access. It is imperative that installations prepare in advance for EPA or state inspections. Installation personnel should be briefed on proper conduct during the inspection which is basically that only designated installation personnel will interface with the inspectors. Procedures should be developed and, if necessary, coordinated with EPA or the state addressing access, escorts, pre- and post-inspection briefs, etc. The pre-brief provides an opportunity for the inspectors to meet the CO and should consist of a *brief* overview of the installation and its environmental program. Any special needs of the inspectors can be identified at that time. The purpose of the post-inspection brief is to ascertain whether any areas of concern were identified by the inspector. Because a determination that a violation exists is not made until after the inspector consults with his superiors and legal counsel, the inspector should not be pressured to identify specific problems nor is it appropriate to challenge the inspector's observations. However, if supplemental information is available on an issue, it should be provided to the inspector at the post-inspection brief or shortly thereafter. In addition, accompanying the inspector during the inspection allows the installation to collect its own independent documentation to verify observations during the inspection for use,

if necessary, in a later enforcement action. However, the inspector should not be forced to accept an escort and, as stated above, this issue regarding escorts should be resolved with the regulators prior to an inspection.

D. **Reimbursement.** Inspections of Federal facilities are an inherent function of EPA and, except as otherwise authorized by law, Federal facilities do not reimburse EPA such inspection costs. However, section 3007(c) of the RCRA requires annual EPA inspections of Federal treatment, storage, and disposal facilities—including groundwater monitoring—and obligates the Federal facility to reimburse EPA inspection costs. An interagency agreement is being negotiated with EPA whereby the DON will reimburse EPA its inspection costs for such inspections performed at Navy and Marine Corps facilities each year. The installation's responsibility will be to review the post-inspection EPA cost statement and ensure the costs reflect the scope of the inspection performed, challenge or dispute questionable costs, and, if the inspection was performed for EPA by a state, ensure an appropriate reduction is made for annual or other inspection fees paid to the state.

0305 ENFORCEMENT RESPONSE. EPA seeks "timely and appropriate enforcement response" measures to ensure Federal facilities achieve and maintain environmental compliance. This section addresses all media programs except CERCLA—which is enforced by interagency agreement.

A. **Overview.** EPA enforcement focuses on negotiation of compliance agreements or consent orders, rather than suits or, except for RCRA, civil penalties. The EPA *Yellow Book* establishes dispute resolution procedures to be followed when negotiations are not fruitful and EPA lacks civil or administrative enforcement authority. 40 C.F.R. Part 22 contains EPA's administrative enforcement procedures. EPA's policy statement at 58 Fed. Reg. 49044, September 21, 1993, describes how those procedures apply, as a result of the Federal Facility Compliance Act, to Federal facilities in RCRA enforcement actions. EPA also shapes enforcement priorities through funding, discussed more fully in Chapter 7 of this Deskbook. Generally, EPA will coordinate enforcement with state regulatory agencies. EPA will seek enforcement in place of an authorized state program only when the state fails to take necessary action or asks EPA to take the lead.

B. **The process.** The first salvo is either a warning letter for minor violations, a Notice of Noncompliance (NON) if EPA lacks administrative enforcement authority, or a Notice of Violation (NOV) / Administrative Complaint / Compliance Order if EPA or the state choose to exercise administrative enforcement authority. The notice must be written, but advance notice by telephone may be given. All are addressed to the commander or head of the facility and usually describe the violation in detail and specify the consequences of not meeting its listed requirements.

Typically, the consequence is escalation of the enforcement action by referral to higher authority.

C. **Facility response.** In order to ensure that substantive defenses are not waived as a result of procedural defects, it is essential that the facility be familiar with EPA and applicable state enforcement procedures to ensure a proper response is timely submitted by the appropriate installation official to the designated EPA or state official. Where minor violations are involved, and a warning letter issued, the facility should submit a "certification of compliance" after making simple corrections. To ensure that the enforcement action is resolved, the installation should seek written acknowledgment from EPA or the state. If EPA issues an NON, and the facility does not dispute the alleged violation, the facility will submit certification of compliance or remedial action plan. The remedial action plan will likely be incorporated into a Federal Facility Compliance Agreement. If the facility believes the violation alleged in the NON is unjustified or incorrect, the facility may invoke the dispute resolution procedures in the *Yellow Book* to contest the finding of noncompliance. Response to an NOV / Administrative Complaint / Compliance Order will require the filing of an "Answer" or "Petition for Hearing." Often, this may be only a "protective filing" to provide time to negotiate a "consent order" and avoid the initial order issued becoming final.

D. **Federal Facility Compliance Agreements (FFCA).** The FFCA is used by EPA only for Federal facilities when formal enforcement is deemed necessary and EPA lacks administrative enforcement authority under the media-specific statute. Appendix I of the *Yellow Book* lists the enforcement response authorities for the major environmental statutes. The FFCA must include a compliance schedule which, as stated above, may be the remedial action plan. The FFCA is, effectively, a memorandum of agreement between EPA and the Federal facility entered into pursuant to Executive Order 12088 as a "plan to achieve and maintain compliance." It requires the Federal agency official signing the agreement to seek any additional funding necessary to fulfill its requirements, consistent with the limitations imposed by the Anti-Deficiency Act. The agreement will typically specify that, if the Federal facility does not agree to its terms within a certain time—usually 30 days—dispute resolution procedures will be invoked or the FFCA will become final. This is an attempt by EPA to treat the FFCA as if it were an administrative order. In practice, the FFCA does not become final and, unless disputes are elevated by EPA and resolved, no FFCA exists. However, the fact that a dispute over the terms of a proposed FFCA exists should not delay implementing the substantive measures to correct any violations.

E. **Dispute resolution procedures.** Dispute resolution procedures are used with EPA unless media-specific administrative enforcement authority exists (e.g., under RCRA). Resolution may take place at the regional, service headquarters, or departmental level. Executive Order 12088 outlines the procedures to be followed

in compliance matters with the dispute resolved ostensibly by the Office of Management and Budget (OMB). Executive Order 12146 outlines procedures for resolution of interagency legal disputes which are resolved by the Attorney General. Once resolved, EPA will usually make a press release.

F. ***Consent orders and administrative hearing procedures.*** NOVs / Administrative Complaints / Compliance Agreements are resolved by entering into consent orders with EPA or the state. As a result of the Federal Facility Compliance Act, EPA RCRA enforcement procedures for Federal facilities are substantially similar to the enforcement procedures EPA uses at private sites. These procedures are contained in 58 Fed. Reg. 49044, September 21, 1993, and 40 C.F.R. Part 22 and generally provide for discovery, a hearing before an administrative law judge, an appeal to a panel of administrative law judges, and consultation with the EPA Administrator. States typically issue NOVs / Administrative Complaints / Compliance Agreements in enforcement actions without regard to principles of sovereign immunity or Federal supremacy. While not conceding jurisdiction, it may be necessary to file an answer or petition for a hearing to allow time to negotiate a state consent order. If the violations cannot be resolved by consent order, it may be necessary to proceed with a state administrative hearing or have the action removed to Federal court. REC counsel should be consulted before proceeding with a state administrative hearing or with regard to the prospect of removing a state enforcement action to Federal court.

G. ***RCRA interim status [3008(h)] corrective action orders.*** EPA has authority to issue 3008(h) orders to Federal facilities that have RCRA interim status. To date, EPA has not addressed how 3008(h) orders will be issued to Federal facilities as a result of the Federal Facility Compliance Act. Issuance of the order appears to be subject to the less formal 40 C.F.R. Part 24 procedures, but violations of the order after it is signed will likely be addressed through a compliance action subject to 40 C.F.R. Part 22 procedures.

H. ***Permits.*** Although not truly an enforcement issue, disputes regarding Federal permit issuance (including any permit conditions), modification, revocation, or denial can be challenged pursuant to 40 C.F.R. Part 124 administrative hearing procedures. Part 124 procedures apply to permits under RCRA, Clean Water Act (CWA), National Pollutant Discharge Elimination System (NPDES), Clean Air Act (CAA) and Safe Drinking Water Act (SDWA).

0306 STATE ROLE IN ENFORCEMENT. EPA retains parallel authority for enforcement even in states with delegated or authorized programs. However, EPA is limited to enforcing only that part of the state program that is authorized or the Federal program if EPA revokes authorization. Unlike EPA, states are not hampered by the unitary executive theory and can sue to enforce statutes as authorized and

necessary. An FFCA between the facility and EPA is *not* a bar to an authorized state enforcement action or, in most cases, a citizen suit. EPA may intercede in a state enforcement action against a Federal facility at the request of either party.

0307 REPRESENTATION. Legal representation in the enforcement action, including representation at an administrative hearing or in negotiating a compliance agreement, is the responsibility of the JAGC or OGC attorney advising the installation or activity that is the subject of the enforcement action. (However, by mutual agreement, local attorneys with environmental law expertise can represent the Federal facility.) Requests for legal assistance should be coordinated with the REC counsel who should be kept apprised of the status of the enforcement action as it proceeds. REC counsel should also be consulted as to the propriety of particular defenses to be asserted in the enforcement action.

0308 COMPLIANCE AGREEMENT GUIDELINES. The following guidelines are provided to assist in negotiating compliance agreements—including FFCAs and consent orders. Sample agreements and model clauses are available from REC counsel or Naval Facilities Engineering Field Division (NAVFAC EFD) environmental counsel.

A. **Parties.** The compliance agreement should be between the installation and EPA or the state. Agreements that are entered on behalf of the DON or the military service, or that impose obligations on upper echelon commands, the service, or the Department, will require coordination with and approval by such commands, the service, or the Department.

B. **Scope.** The agreement should address only the violations at issue and avoid collateral matters or commitments of general future compliance. The actions to be taken should be specific discrete steps to correct the violations.

C. **Violations.** Factual witnesses should be consulted, technical assistance obtained, and statutory, regulatory, and EPA or State policies reviewed to determine whether the violations cited are supported by the facts or the law.

D. **Obligations.** The measures included in the compliance agreement to correct the violations should not abdicate responsibility for management of the facility environmental program, should be achievable, and should be capable of being achieved within the time periods specified in the order.

E. **Funds.** If funds are not available to perform the compliance actions in the order, a commitment should be included in the order to seek the necessary funds. The order, however, should state that nothing in the order shall be construed as a

requirement to violate the Anti-Deficiency Act. A lack of funds is a basis to extend the time for performance, but does not excuse ultimate non-performance or noncompliance.

F. ***Force majeure.*** A force majeure clause allowing for time extensions should be included to protect against events beyond the facility's control.

G. ***Dispute resolution.*** A dispute resolution clause should be included to provide procedures for addressing disputes that may arise in implementing the agreement. Such procedures may be included as a precondition to administrative enforcement action if the order is subject to administrative enforcement.

H. ***Stipulated penalties.*** A stipulated penalties clause is an advance agreement on the amount of penalties to be paid if violations of the order occurred. Absent a stipulated penalties clause, EPA or a state can impose penalties for violations of the order to the extent and in the amount allowed by law. Whether to include a stipulated penalties clause requires an assessment of the risk of what penalties might be assessed absent the clause. If a state seeks to include a stipulated penalties clause, but disagreement exists over whether the Federal Government is subject to state penalties, a stipulated penalties clause can be included that commits to an amount of penalties, but expressly reserves all rights, defenses, and immunities regarding the state's authority to assess and collect penalties.

I. ***Termination.*** A termination date, or procedures for seeking termination, should be included so that the order does not continue in effect beyond an appropriate time.

J. ***Signature.*** The agreement or order should normally be signed by the CO of the installation or activity having responsibility for the activities that led to the violations and authority to ensure that the measures needed to correct the violations are implemented. However, organizational environmental directives should be consulted with regard to authority and responsibility for signing agreements and orders.

0309 CIVIL PENALTIES. This section addresses the policy and procedures for paying civil or administrative penalties when, by law, the Federal facility is subject to such penalties. *See also* Chapter 2.

A. ***Policy.*** Department of Defense policy, as stated in the Deputy Assistant Secretary of Defense Memorandum dated December 17, 1992, is that penalties for violations pertaining to normal, routine, or daily operations shall be paid from the operational account of the installation or activity most directly responsible for the violation. Where civil penalties assessed are for violations involving different

commands and activities on the installation, it is the responsibility of the installation and those commands and activities to determine how to allocate responsibility for paying the penalty. Usually, the penalty amount can be broken down by each violation unless a lump-sum compromise settlement is negotiated. If the amount of the penalty exceeds the installation's ability to pay, it may be necessary to obtain additional funds from the appropriate major claimant. If sufficient funds are still unavailable, the installation should pay what it can and, subject to Anti-Deficiency Act restrictions, commit to seeking the remainder through the budgetary process. Although in such circumstances payment of penalties may be delayed, no authority exists under current waivers of sovereign immunity to pay interest on such penalties.

B. *Penalty calculation methodology.* EPA and most states have procedures for calculating penalty amounts. Typically, the amount of the penalty is based on the severity of the violation and designed to serve a twofold purpose: (1) deterrence, and (2) removal of the profit motive for the violation. The amount of penalties to be paid is an item subject to negotiation the same as other elements of the compliance agreement. Therefore, it is essential to be familiar with EPA and state penalty calculation methodologies. Many aspects of the penalty calculation methodology were designed strictly for application to private entities and make no allowance for unique Federal considerations. A copy of the EPA penalty policy (references G, H, and I, above) may be obtained from REC or NAVFAC EFD counsel.

C. *Supplemental enforcement projects (SEPs).* EPA and most states allow for the performance of SEPs in lieu of paying penalties or a portion of penalties. What qualifies as a SEP is subject to negotiation, but usually the cost to perform the SEP must bear some relationship to the amount of penalties that otherwise would have been paid and the SEP cannot be a project the installation already has in progress or is planning to undertake. SEPs are a viable option in lieu of paying penalties and should benefit the installation's environmental program. The decision to perform a SEP instead of paying a penalty is a matter of policy, but it should take into account the administrative and financial burden of the SEP—including the fact that performance of the SEP will likely be part of the compliance agreement—as compared to the quick resolution that payment of a monetary penalty provides. REC counsel should be consulted regarding the latest SEP policy before a decision to perform a SEP is made.

0310 OTHER INFORMATION IN THE YELLOW BOOK. The *Yellow Book* is a handy reference for judge advocates and OGC counsel with environmental responsibilities. Chapter II and Appendix A provide summaries of the major environmental statutes. Appendix B contains reprints of Executive Orders 12088, 12146 and 12580. Appendix F lists reporting, recordkeeping, and self-monitoring requirements under major media programs. Chapter VIII summarizes EPA's organization and lists the Federal Facilities Coordinators in each region. One page

is missing from the *Yellow Book*; the text is provided in the appendix to this chapter. This page should be inserted as page 3 of Attachment 4 to Appendix K, relating to model language for dispute resolution.

0311 POINTS OF CONTACT. Enforcement actions should be handled consistent with existing organizational directives and command policies. Questions regarding enforcement issues should be referred to counsel assigned to the REC, Area Coordinators, and, for the Marine Corps, Western Area Counsel Office (WACO) and Eastern Area Counsel Office (EACO). Environmental counsel at NAVSEA and NAVFAC EFDs and Engineering Field Activities (EFAs) are also familiar with these issues. If questions remain unresolved, they may be referred to legal counsel for N45, Office of Counsel for the Commandant of the Marine Corps (CMC), or the Office of Assistant General Counsel (OAGC)(Installations and Environment (I&E)).

Yellow Book
Page 3, Attachment 4, Appendix K

. . . day escalation period, the Parties shall be deemed to have agreed with U.S. EPA's position with respect to the dispute.

D. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to Subparts A, B or C of this Part. The Parties shall each designate an individual and an alternate to serve on the DRC. The individuals designated to serve on the DRC shall be employed at the policy level (5 ES or equivalent) or be delegated the authority to participate on the DRC for the purposes of dispute resolution under this Agreement. Following escalation of a dispute to the DRC as set forth in Subpart C, the DRC shall have thirty (30) days to unanimously resolve the dispute. If the DRC is unable to unanimously resolve the dispute within this thirty (30) day period any Party may, within ten (10) days of the conclusion of the thirty (30) day dispute resolution period, submit a written notice of dispute to the Administrator of U.S. EPA for final resolution of the dispute. In the event that the dispute is not escalated to the Administrator of U.S. EPA within the designated ten (10) day escalation period, the Parties shall be deemed to have agreed with the U.S. EPA DRC representative's position with respect to the dispute.

E. Upon escalation of a dispute to the Administrator of U.S. EPA pursuant to Subpart D, the Administrator will review and resolve such dispute as expeditiously as possible. Upon resolution, the Administrator shall provide the [Department / Agency] and [State] with a written final decision setting forth resolution of the dispute.

CHAPTER IV

FEEES AND TAXES

0401 REFERENCES

- A. U.S. Const. art. VI
- B. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 1
- C. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 1

0402 SCOPE. This chapter deals with issues arising from the imposition of various assessments by Federal, state, or local authorities in connection with environmental protection programs and activities. It is closely related to Chapter 2, which deals with issues of sovereign immunity and other problems associated with Federal agencies as regulated entities and which should be read first. This chapter is also related to Chapter 9, which deals with litigation. This chapter discusses factors to be considered in determining whether an involuntary assessment may be paid.

0403 ENVIRONMENTAL FEES AND TAXES GENERALLY. The question whether a particular assessment is a fee for services rendered (and therefore generally payable) or a tax designed to raise revenue (and therefore generally not payable) is not unique to the environmental world. Fee / tax issues are increasingly arising in an environmental law context, however. The combination of liberal waivers of sovereign immunity and the need to finance burgeoning bureaucracies necessary to administer more complex and ambitious regulatory programs makes environmental charges a fertile area for fee / tax issues. Financially strapped states and localities are eagerly seeking new sources of revenue. The battle cry of "the polluter pays" is not only a very simplistic and appealing slogan, it is also the law. Congress increasingly includes measures in environmental legislation that force EPA and the states to try to recover the cost of the program from the regulated community. See, e.g., 42 U.S.C. § 7661a(b) (Clean Air Act (CAA) permit program to be financed by

fees); 33 U.S.C. § 1311(o) (EPA to recover administrative costs of Clean Water Act (CWA) permits). In addition, economic factors are increasingly being included in environmental laws not only to finance traditional "command and control" programs, but to be the vehicle of regulation itself. The problems raised are difficult to work out because this is a rapidly evolving area and because the programs often arise from mixed motives.

0404 SOVEREIGN IMMUNITY. Because fee / tax issues often involve potential state control of Federal activities, sovereign immunity must be considered. (A brief discussion is provided here. For a more detailed discussion, see Chapter 2.) Absent congressional waiver, the supremacy clause — Article 6 — exempts Federal activities from regulation by any state. The seminal case is, itself, a tax case. See *McCulloch v. Maryland*, 17 (4 Wheat) U.S. 316 (1819) (national bank chartered as a Federal entity exempt from state tax). Any waiver of this sovereign immunity must be clear and unambiguous. See *EPA v. California*, 426 U.S. 200, 211 (1976) (Federal installations not required to obtain state water pollution discharge permits). Waivers of sovereign immunity will be strictly construed in favor of the sovereign. See *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. 1627, 1639 (1992) (sovereign immunity not waived as to punitive civil penalties under Resource Conservation and Recovery Act (RCRA) and CWA).

A. The law is not entirely clear, however, whether a state charge that is a "user fee" under the test in *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (discussed in detail *infra* at para. 0405) is a regulation or tax that requires sovereign immunity analysis. In *Massachusetts*, the Court concluded that intergovernmental immunity analysis was not required because it determined that the charge was a user charge, not a tax. 435 U.S. at 466. Although the *Massachusetts* opinion did not address the issue of sovereign immunity because it was a Federal charge in question, courts dealing with both sovereign immunity and intergovernmental immunity both ultimately rely on *McCulloch v. Maryland*, and frequently cite both lines of cases for support.

B. Another case, however, relied heavily on sovereign immunity analysis. In *Mayo v. United States*, 319 U.S. 441 (1943), the Court struck down the application of a Florida inspection fee to fertilizer owned and distributed by the Secretary of Agriculture as part of a Federal soil conservation program. The inspection fee was part of a comprehensive inspection scheme designed to insure the quality of fertilizer distributed to the public. The Court used a traditional supremacy clause analysis, cited to cases dealing with intergovernmental immunity, but then distinguished them: "But where, as here, the governmental action is carried on by the United States itself and the Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues." 319 U.S. at 448. See also *City of Los Angeles v. United States*, 355 F. Supp. 461, 464 (C.D. Cal. 1972)

(Navy did not have to pay city pilotage fees). Absent evidence of excess revenues, the charges in *Mayo* and *City of Los Angeles* would be "user fees" under a *Massachusetts* analysis. The *Massachusetts* opinion did not cite *Mayo*.

C. As discussed in detail in Chapter 2, most environmental laws contain liberal waivers of sovereign immunity. One statute goes even further and resolves the fee / tax issue by making Federal agencies "subject to the same conditions, regulations, requirements, **fees, taxes, and surcharges** imposed by the compact commission, and by the State in which such facility is located, in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government." See Low Level Radioactive Waste Policy Act, 42 U.S.C. § 2021d(b)(1)(B). Most of the waivers, however, contain an express waiver of sovereign immunity for "reasonable service charges." See, e.g., 33 U.S.C. § 1323(a) (CWA); 42 U.S.C. § 6961 (RCRA). The CAA waiver is perhaps somewhat broader than the typical provision, waiving sovereign immunity for a "fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program." See 42 U.S.C. § 7418(a). When dealing with such statutes, counsel must determine whether the assessment fits within the terms of the waiver of sovereign immunity with the requisite clarity. Most of the waivers for "fees" are best analyzed using traditional fee / tax doctrines.

0405 DISTINGUISHING FEES FROM TAXES - THE MASSACHUSETTS TEST. Legal characterization of charges is most often based on the purpose of the assessment. If the primary purpose for a state charge is to raise revenue, the charge is a tax. See *Brock v. Wash. Metro. Area Transit Auth.*, 796 F.2d 481, 486 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). On the other hand, government entities are generally required to pay for services they receive. Charges intended simply to recover costs are termed user fees. *Massachusetts v. United States*, 435 U.S. 444, 461 (1978). Finally, some assessments imposed by state and Federal agencies are neither revenue-raising taxes or service fees, but rather regulatory fees that are imposed primarily to control particular behavior. *Head Money Cases v. Robertson*, 112 U.S. 580 (1884).

A. The most frequently used test to determine whether a particular assessment is an acceptable fee or an impermissible tax is that explained in *Massachusetts v. United States*, *supra*. In that case, the Court had before it a challenge by a state to a Federal levy — a flat tax imposed on all aircraft. The state alleged that requiring it to pay even a nominal sum — \$131.43 — for a helicopter that was used solely for police functions constituted an impermissible tax on a state governmental function. 435 U.S. at 452. Although this case dealt with intergovernmental immunity rather than an immunity derived from the supremacy clause, the analysis is much the same. The Court held that the assessment was not

a tax at all, but a user charge that sought to recover part of the FAA's cost of maintaining the Federal air traffic control system. 435 U.S. at 467.

B. The *Massachusetts* court adopted a three-part test for assessments which are suspect unless they pass all three parts. First, the charge cannot discriminate against the government. Second, the charge must be a fair approximation of the benefit received. Third, the charge cannot be structured to produce revenues in excess of the cost of the service. *Id.* Application of the *Massachusetts* test requires understanding the administration of the state's regulatory program and its budget and fiscal processes. Oftentimes, problems with a state assessment can be analyzed under more than one of the three parts.

1. ***Discrimination.*** Most states are sufficiently sophisticated to not overtly discriminate against Federal agencies by, for example, only assessing uniquely Federal functions. More often, the discrimination comes from restrictions on availability of benefits or occasionally by internal allocation of funds differently for fees paid by Federal agencies. One common feature of state programs that bears inquiry, but is not always fatal, is a provision that exempts certain state or local agencies from charges that Federal agencies are expected to pay. Although this appears discriminatory, it may not be if, for example, the state bears the expense for the exempted agencies through other means and does not pass it on to the Federal agency and the rest of the regulated community.

2. ***Fair approximation test as applied.*** Two principal issues frequently arise in trying to apply the fair approximation test. The first issue is whether the charges must be commensurate with the value of the services ***received directly*** by the Federal agency, or whether the charges must only fairly approximate a broader range of benefits that are only ***available*** to or ***indirectly bestowed*** upon the agencies. The second area of dispute is how much precision is required in determining what is a "fair approximation."

a. ***Direct versus indirect benefits.*** The best answer to the first issue lies in *Massachusetts* itself. There, the Court confronted a similar argument from the state itself which argued that the police helicopter assessed the flat fee never made use of the FAA's air traffic control services and thus derived no benefits. The Court brushed aside this objection, noting:

Every aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States. And even those aircraft, if there are any, that have never received specific services from the National Government benefit from them in the sense that the

services are available for their use if needed and in that the provision of the services makes the airways safer for all users.

435 U.S. at 468 (citing *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935) (vessel not the recipient of any police services could be required to pay a charge designed to defray their costs since the services redounded to the benefit of all vessels in the port). The Court's opinion noted that Congress was aware that the flat annual fee at issue was "only indirectly related to system use." 435 U.S. at 451. The Court permitted an imperfect fee system in part because of the additional administrative expense involved in a precise system that could measure the exact benefit received. 435 U.S. at 463. Finally, indirect, ambient benefits not actually paid to the contributor still must be considered in determining whether the benefits received from a program have a fair relation to the fee. See *Brock v. Wash. Metro. Area Transit Auth.*, 796 F.2d 481, 487 (D.C. Cir. 1986). (cert. denied)

b. Arguments in favor of careful analysis of direct benefits most often rely on *Nat'l Cable TV Ass'n v. United States*, 415 U.S. 336 (1974) or its companion case, *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). That case held that the FCC improperly calculated the amount it could charge operators of community antenna television systems because it included the value of benefits received by the public at large rather than the value of identifiable services received by specific individual licensees. Reliance on *Nat'l Cable TV*, although attractive, is not persuasive.

c. First, although in dicta the Court obviously was influenced to construe the Independent Offices Appropriation Act (IOAA), 31 U.S.C. § 483a, strictly to avoid constitutional problems it feared would arise if an agency were permitted to impose taxes as opposed to fees, the actual holding of the Court was rooted in statutory language and the case is only binding for its interpretation of that specific language. See *Nat'l Cable TV* at 342; *Fed. Power Comm'n* at 346; see also *Union Pac. R.R. Co. v. Pub. Util. Comm'n of Oregon*, 899 F.2d 854, 860 (9th Cir. 1990); *Maine v. Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992). In *Fed. Power Comm'n*, the Court made it even clearer that its holding that a specific beneficiary of particular benefits was required by the statute itself by considerable reliance on both legislative history and deference to OMB implementing directives. See *Fed. Power Comm'n* at 349-50.

d. Second, when confronted with the question of governmental immunity and determination of what is a "fee" only four years later, the Court did not adopt the *Nat'l Cable TV* result, but rather adopted a broader test developed originally for the interstate commerce analysis in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). See 435 U.S. at 466. (The Court did cite *National Cable*, but only for the proposition that the power to tax is

the power to regulate. See 435 U.S. at 455. The power of the state to regulate Federal agencies with respect to solid and hazardous waste is not in question. See 42 U.S.C. 6961.) Thus, cases construing this three-part commerce clause test better illustrate what the Court was about in *Massachusetts* than do cases dealing with the IOAA.

3. ***What precision is required?*** With respect to the precision required in determining a fair approximation, it is noteworthy that the *Evansville* court did not require the sort of precise analysis found in *Nat'l Cable TV*, but upheld a per capita charge on enplaning passengers because it found it to be "a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed" even though it exempted *a majority* of the actual passengers using the facilities. See 405 U.S. at 717. The exceptions were "not wholly unreasonable" and reflected rational distinctions among different classes of passengers and aircraft.

a. More recently, in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court was confronted with a claim by Sperry Corporation that a 1.5 percent user fee, assessed against all awards made by the Iran-United States Claims Tribunal in favor of American nationals, was an impermissible tax because the government consolidation of claims against Iran was compulsory and because Sperry and Iran reached agreement on claims without the assistance of the tribunal. The Court upheld the user fee, noting:

This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a fair approximation of the cost of benefits supplied. [citing *Massachusetts v. United States*]

493 U.S. at 60. See also *Brock v. Wash. Metro. Area Transit Auth.*, 796 F.2d 481, 485 (D.C. Cir. 1986) (*Massachusetts* did not hold that a user fee must represent retrospectively a close approximation of the actual, historical benefit to the user but only a rationally designed method to approximate prospectively the benefit to the user).

b. The rationale for intergovernmental tax immunity itself augurs against requiring a detailed accounting of the program in question to determine whether the benefits available are commensurate with the fees which support it. An interpretation of the *Massachusetts* test that necessarily must frustrate the purpose of the test is implausible. Although the immunity of the Federal Government from state taxation is based on the supremacy clause rather than solely on the doctrine of intergovernmental immunity, the application of both

doctrines to intergovernmental charges both can be traced to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). There, the Supreme Court was concerned that allowing intergovernmental taxes would lead to undue interference of one government with another. See also *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477-78 (1939).

c. Conducting a detailed analysis of each program element to trace allocation of overhead and individual revenue streams all the way through to the delivery of a specific product to a specific recipient may be appropriate and necessary under the procurement laws. However, this sort of process can be extremely intrusive and can result in application of either detailed guidelines or a series of value judgments about the propriety of each expenditure. This sort of rigorous scrutiny can amount to just the sort of undue interference that the Court tried to avoid in *McCulloch v. Maryland*. For an example of the difficulty in conducting such an analysis, see *Brock v. Washington Metropolitan Area Transit Authority*, 796 F.2d 481, 485 n. 7 (1986).

d. This is not to say that state assessments should necessarily be taken at face value without any analysis. Program elements can be examined in a macro sense to determine whether the benefits they provide, in general, are available to Federal agencies. When this sort of analysis is complete, an assessment that is designed prospectively to approximate all the benefits available, direct and indirect, is a fee and is payable. Some courts have characterized this as a fair relation of cost and benefit or a lack of disproportionality [see *Brock v. Wash. Metro. Area Transit Auth.*, 796 F.2d 481, 485-86 (D.C. Cir. 1986)] or "not so clearly excessive as to belie their purported character as user fees." *Sperry* at 62.

4. **Testing for fair approximation.** The balance is best struck by determining the overall revenues generated by assessments applicable to the Federal Government, and then comparing them with the expenditures in support of program elements that make available at least some relevant benefits to Federal activities. That is, revenues from assessments applicable to the Federal Government (which, to avoid being discriminatory, must be applicable to similarly situated entities — Hazardous Waste (HW) generators, transporters, etc.) are compared to the amount of expenditures for programs that provide services, gather information or administer resources reasonably related to the subject of the waiver of sovereign immunity. Services, information, or resources devoted to other purposes, no matter how worthy, are not available for the purpose set out in the waiver and must be discounted. If the revenues and expenditures are roughly equivalent, the assessment should be paid. Information necessary to make these comparisons should be available through state budget documents which should be sufficient for the sort of "rough" approximation that is required. For an example of how this sort of analysis has been applied, in *State of Maine v. Department of Navy*, 973 F.2d. 1007 (1st Cir. 1992), the court summarized the facts as follows:

Table 4-1	1984	1985	1986
Total Disbursements from HW Fund	\$177,000	\$259,000	\$245,000
Proceeds of HW Generation Fee (all sources)	\$196,000	\$193,000	\$249,000

The court found that this established a "rough relation" sufficient to satisfy the *Massachusetts test*. *Maine* at 1013. The court also noted that the Navy had paid \$54,500.00 in fees over three years and received services that the State of Maine valued at \$61,000.00.

C. **Excess revenue generation.** As discussed earlier, one of the hallmarks of taxes is generation of revenue for nonrelated purposes. That is, if the assessment produces significant amounts of funds that are available for general purposes, it may well be a tax. Resolution of these issues requires careful analysis of state financial management. Ideally, environmental assessments go into environmental accounts and are then expended for environmental purposes, making analysis easy. Often, however, all assessments go into the state general fund where they are available for appropriation for a number of projects. Depositing proceeds from a particular assessment into a general fund does not automatically make it a tax, however. See *New York State Dep't of Env'tl. Conservation v. U.S. Dept. of Energy*, 772 F. Supp. 91, 102 (N.D.N.Y. 1991). In *Maine*, *supra*, the court did not find any improper revenue generation even though, in some years, proceeds exceeded expenditures. See *generally* 973 F.2d at 1013. This is not to say that Federal agencies have to audit state program expenses and fee revenues for every fee. Much of the information required is contained in state budget documents that are publicly available.

0406 PROCEDURES. Disbursing and supply offices should be alert to invoices for new assessments from state and Federal regulators and should contact counsel before approving them for payment. If the assessment is new, it should be reported to the Regional Environmental Coordinator (REC) so that all Navy activities can take a consistent approach. If the matter is resolved against payment on a regional level, the matter should be forwarded to the Office of the Assistant General Counsel (Installations and Environment) (OAGC (I&E)) for consultation with the Department of Justice (DOJ) at the departmental level because of the potential for litigation. Installations are free, of course, to raise nonprogrammatic issues, such as miscalculation or misapplication of the fee. Installations are free to provide information necessary to calculate assessments, but must be careful to preserve any defenses available under state law. The Federal Government does not pay assessments "under protest." If a command has legitimate doubts about whether an

assessment is payable or not, it should make it plain to the state agency that the delay is caused by necessary legal analysis rather than mere resistance to regulation.

0407 ADDITIONAL READING. For a detailed examination of this subject, see Commander Patrick A. Genzler, JAGC, USN, *Federal Facility Payment of State Environmental Fees*, 38 Naval L. Rev. 149 (1989); Lieutenant Colonel Richard E. Lotz, USAF, *Federal Facility Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties*, 31 A.F. L. Rev. 7 (1989); Lieutenant Colonel William D. Benton, USAF, & Byron D. Baur, *Applicability of Environmental "Fees" and "Taxes" to Federal Facilities*, 31 A.F. L. Rev. 253 (1989).

0408 POINTS OF CONTACT. Environmental counsel assigned to RECs, Area Coordinators, NAVFAC EFDs, and for Marine Corps personnel, WACO and EACO can be contacted regarding fees / tax issues. When questions cannot be resolved by these attorneys, the following additional points of contact are provided:

- A. Legal Counsel, Office of CNO (N-45)
 (703) 602-3028 DSN 332-3028
- B. Office of Counsel (Code CL) Headquarters Marine Corps
 (703) 614-2150 DSN 224-2150
- C. Office of Assistant General Counsel (I&E)
 (703) 602-2252 DSN 332-2252

CHAPTER V

DEPARTMENT OF THE NAVY'S (DON's) ORGANIZATION FOR ENVIRONMENTAL COMPLIANCE

0501 REFERENCES

- A. Article 0802, U.S. Navy Regulations 1990
- B. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 2
- C. OPNAVINST 5400.24D, Subj: COMMAND, AREA COORDINATION AND COMMAND RELATIONSHIPS
- D. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 2

0502 INTRODUCTION. This chapter outlines Navy and Marine Corps command and supporting activity responsibilities for environmental program matters.

0503 GENERAL. Reference (a) Paragraph 0802 provides that the responsibility of the commanding officer (CO) for his / her command is absolute, and that the authority of the CO is commensurate with his / her authority. Environmental compliance is a significant command responsibility at most Navy and Marine Corps activities. Although there exist numerous technical and engineering support organizations within the Navy, ultimate responsibility for environmental compliance rests with the CO and his or / her chain of command.

0504 DEPUTY UNDER SECRETARY OF DEFENSE (ENVIRONMENTAL SECURITY) (DUSD(ES)). The DUSD(ES) is the senior Department of Defense (DOD) environmental official. The Office of the DUSD(ES) establishes overall DOD environmental policy. Current policy centers around the rubric "C cubed P squared

plus T," for cleanup, compliance, conservation and pollution prevention, plus technology.

0505 ASSISTANT SECRETARY OF THE NAVY FOR INSTALLATIONS AND ENVIRONMENT (ASN (I&E)). The ASN(I&E) is one of four ASNs. ASN(I&E), through the Deputy ASN for Environment & Safety, establishes environmental policy for DON and represents the Department in environmental matters to the Office of the DUSD(ES), other military departments and federal agencies, Congress, the states, and the public.

0506 NAVY ENVIRONMENTAL ORGANIZATION

A. **Chief of Naval Operations (CNO).** Although environmental compliance is a responsibility of all CNO divisions, two divisions have significant specific environmental responsibilities. The Director, Environmental Protection, Safety & Occupational Health Division (N45), is primarily responsible for environmental cleanup, compliance, conservation, and pollution prevention. The Director, Shore Facilities (N44), is primarily responsible for environmental planning, to include compliance with the National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA). N44 also manages military construction, air installation compatible use zone, and base realignment and closure matters. Specific responsibilities are discussed in reference (b).

B. **Major claimants.** Major claimants are echelon II commands having responsibility for particular functional areas within the Navy. Major claimants include Navy Systems Commands, Fleet Commanders, Naval Facilities Engineering Command (NAVFACENGCOM), the Chief of Naval Education and Training (CNET), and the Commander, Naval Reserve Force (COMNAVRESFOR). Through environmental compliance evaluations conducted per reference (b), major claimants monitor and manage the environmental performance of subordinate activities. Major claimants are responsible for management, funding, and inspection of environmental compliance programs at subordinate activities.

C. **Area coordinators.** Area coordinators are designated by CNO under reference (c). Area coordinators are responsible for ensuring effective horizontal integration of Navy shore activities, in a wide range of areas, including environmental. Area coordinators execute this responsibility mainly through appointment and oversight of regional environmental coordinators. As of press time of this deskbook, it is anticipated that the CNO will realign area coordinator AOR, for environmental purposes, to match U.S. Environmental Protection Agency regions. This modification is expected to be incorporated into the next iterations of references (b) and (c). Also as of press time, the DUSD(ES) Office is considering establishment

of an inter-service environmental coordination infrastructure, wherein one uniformed service would take the lead in each EPA Region for military environmental coordination matters. It is anticipated that DON would be assigned responsibility for EPA Regions 1, 3 and 9.

D. **Regional environmental coordinators (RECs).** RECs, appointed by area coordinators, coordinate environmental matters and facilitate information sharing within their designated areas of responsibility. RECs, assisted by NAVFACENGCOM, are also responsible for monitoring state and local environmental legislation and regulation development, and providing a coordinated Navy position. In many cases, RECs are also designated by area coordinators as Navy On-Scene Coordinators (NOSCs) for oil and hazardous substance spill planning and cleanup. Most REC staffs have environmental counsel whose function is to provide legal advice on matters relating to regional coordination. The REC may make such counsel available to assist command counsel in resolving installation or shipboard environmental issues. Reference (b) discusses specific responsibilities of RECs and NOSCs.

0507 MARINE CORPS ENVIRONMENTAL ORGANIZATION. The Commandant of the Marine Corps (CMC) Installations and Logistics Department, Facilities and Service Division, Land Use and Military Construction Branch (LFL) is responsible for all aspects of environmental management within the Marine Corps. Marine Corps field activities report directly to LFL for environmental matters. Environmental legal advice to Marine Corps Commands is provided by Marine Corps Area Counsel Offices, one on the East Coast and one on the West Coast. Additional information regarding Marine Corps environmental organization is provided in reference (d).

0508 NAVFACENGCOM. Although an echelon II command subordinate to CNO, NAVFACENGCOM provides a wide range of environmental support to both Navy and Marine Corps commands. Service provided includes advice and assistance in the areas of environmental compliance, cleanup, public works, legal services, environmental compliance evaluations, and base realignment and closure. NAVFACENGCOM accomplishes these functions through its network of subordinate commands: the Engineering Field Divisions and Activities (EFD / EFA), Public Works Centers (PWC), and the Naval Facilities Engineering Service Center (NFESC), formerly known as the Naval Energy & Environmental Support Activity (NEESA). Among NAVFACENGCOM's environmental responsibilities are the following:

A. Programming and executing the Navy Installation Restoration (IR) program, using Defense Environmental Restoration Account (DERA) funds. Acts as lead negotiator for DON on IR related agreements.

Consolidated Environmental Law Deskbook

B. Through the NFESC, manages the Naval Environmental Protection Support Service (NEPSS). The NEPSS includes various offices that provide environmental engineering, research, data management, and information exchange services to Navy and Marine Corps activities. The NEPSS includes specialty offices dealing with ordnance, aviation, ship and marine environmental issues, as well as laboratories conducting environmental research, development, testing, and evaluation.

C. Upon request, provides environmental planning, engineering, contracting services and legal advice to naval activities.

D. Maintains the DON National Register of Historic Places and issues Archeological Resources Protection Act (ARPA) permits for Navy-managed land.

E. Assists Regional Environmental Coordinators in developing Navy positions on emergent state and local environmental statutes, ordinances and regulations.

Reference (b) provides more detailed discussion of the roles, responsibilities, and assistance available from NEPSS Offices.

0509 OFFICE OF GENERAL COUNSEL (OGC)

A. **General Counsel (GC).** Per paragraph 0327 of reference (b), GC is responsible for providing legal advice, counsel and guidance within DON on environmental law and litigation. Although environmental legal advice is provided world-wide by uniformed and civilian attorneys of the Navy and Marine Corps, GC is the final authority within the Department regarding environmental legal questions, including those arising in the field.

B. **Assistant General Counsel (Installations & Environment) (AGC (I&E)).** The GC is supported in environmental matters by AGC (I&E) who heads an office of subject matter specialists in environmental and real estate law. Field attorney consultation with the OAGC (I&E) for advice and assistance is appropriate, after proper coordination with the cognizant operational and / or administrative chain of command. The OAGC (I&E) must be consulted on precedent-setting or programmatic legal issues that could affect the Navy as a whole.

C. **Litigation office.** OGC Litigation Office is responsible for monitoring, overseeing, and as necessary directly supporting all environmental litigation involving DON. Per reference (b), field counsel must ensure that the Litigation Office is kept apprised of all information received regarding actual or potential litigation. Such information typically includes notices of violation or noncompliance, citizens suit notifications, and potentially responsible party notifications.

CHAPTER VI
ENVIRONMENTAL COMPLIANCE
EVALUATIONS

0601 REFERENCES

- A. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 4
- B. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 4
- C. Freedom of Information Act (FOIA), 5 U.S.C. § 552
- D. DOD Directive 5405.2, Subj: RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DOD PERSONNEL AS WITNESSES; 32 C.F.R. Part 97
- E. SECNAVINST 5720.42E, Subj: DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT (FOIA) PROGRAM; 32 C.F.R. 725
- F. SECNAVINST 5820.8A, Subj: RELEASE OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF NAVY (DON) PERSONNEL
- G. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25004 (July 9, 1986) (Reprinted at Appendix D of *The EPA Federal Facilities Compliance Strategy Manual*, November 1988 (*The Yellow Book*, pending revision))

0602 OVERVIEW. Federal regulations and EPA policy on Federal facility compliance recommend environmental "audits" or evaluations as a tool to ensure compliance and reduce Notices of Violations (NOVs). Whether the activity is styled as an audit, assessment, or evaluation, EPA favors any systematic, documented, periodic, and objective review of facility operations and practices related to meeting environmental requirements.

A. ***The Navy ECE Program.*** To that end, the Navy has implemented the Environmental Compliance Evaluation (ECE) program which applies to all shore activities within the United States and its territories, and to overseas activities. An effective ECE program reduces the need for EPA inspections at Federal facilities. The ECE program provides a means to monitor, achieve, and maintain compliance with environmental and natural resources regulations. ECEs in the United States and its territories address Federal, state, local, DOD and OPNAV environmental and natural resources requirements, as well as the management of those programs.

B. ***ECE objectives and benefits.*** The ECE program:

1. Verifies whether Navy environmental and natural resources program management practices are in place, functional, and adequate;
2. identifies actual and potential areas of noncompliance;
3. identifies areas likely to be in noncompliance as a result of projected changes in Federal, state, and local requirements;
4. recommends corrective actions, including funding sources, for achieving compliance;
5. provides immediate assistance to shore activities in the implementation of easily accomplished corrective actions;
6. identifies personnel needs to achieve and maintain environmental compliance;
7. identifies training needs of personnel having environmental compliance responsibilities;
8. identifies policies to promote safety and efficiency in achieving environmental compliance;
9. reminds facilities of permit renewal and other deadlines; and
10. provides a database useful in planning, justifying funding requests, and responding to regulator rulemaking proposals.

C. ***ECE program structure.*** The ECE program is structured in tiers, using existing organizations and procedures to the maximum extent possible. The auditing tiers stress action at the local level and provide the requirement for

Environmental Compliance Evaluations

management oversight. Tier 1 is the Activity Self ECE. Tier 2 is the Major Claimant ECE. Tier 3 is the Navy Inspector General (IG) environmental compliance inspections.

0603 ACTIVITY SELF ECE. This ECE is an evaluation conducted by the Navy activity itself. The self ECE examines the activity's environmental and natural resources compliance posture and overall environmental management. The self ECE results in a report to the commanding officer or to the Contracting Officer's Technical Representative (COTR) in the case of Government-Owned / Contractor-Operated (GOCO) facilities. Activity self ECEs are performed annually even in years when a major claimant ECE or Inspector General (IG) environmental compliance inspection occurs.

0604 MAJOR CLAIMANT ECE. This Tier 2 ECE is a detailed environmental and natural resources compliance evaluation conducted by the major claimant. Implementation responsibility of the major claimant ECE program may be delegated to the lower echelon claimant. The major claimant ECE produces a report from the major claimant to the activity's commanding officer, or to the COTR in the case of GOCO facilities. ECEs are performed by the major claimant at each of its shore activities, including GOCOs, at least once every three years. In addition, a major claimant ECE must be conducted no later than six months after an activity has been cited as a "significant non-complier" (SNC) by a regulatory agency.

0605 EXEMPTION PROCEDURES. The Navy has numerous shore activities which serve only administrative functions and consequently pose little risk to the environment. Recognizing that the limited environmental management requirements at those activities may make ECEs unnecessary, paragraph 4-5.6 of OPNAVINST 5090.1A permits major claimants to exempt them from the ECE requirement. This allows the major claimant to focus its efforts on shore activities with significant environmental responsibilities.

A. ***The risk survey.*** The first step in the two-part exemption process is the environmental risk survey which the major claimant performs on nonindustrial shore activities deemed to pose little or no environmental risk. The survey examines the activity's overall compliance with Federal, state, and local environmental requirements and the potential risk its operations may have on the environment. Risk surveys may cover individual activities or entire types of activities.

B. ***EFD review.*** If the major claimant finds that an activity does in fact pose a low environmental risk, exemption from all or portions of the major claimant's ECE may be justified. The major claimant forwards the survey to the Engineering

Consolidated Environmental Law Deskbook

Field Division (EFD) of the Naval Facilities Engineering Command (NAVFACENGCOM) serving the major claimant. EFD reviews the risk survey and approves or rejects the exemption.

0606 COMBINING FOR EFFICIENCY. Even where an outright exemption would be inappropriate, several provisions in chapter 4 of OPNAVINST 5090.1A permit commands to coordinate their duties to conduct ECEs with other commands to reduce their administrative burden.

A. **Host / tenant ECEs.** At shore activities with tenants, paragraph 4-5.5 of OPNAVINST 5090.1A permits the host and tenant major claimants to perform the ECE jointly. Tenants exempted by the major claimant shall be covered under the ECE performed for the host activity by its major claimant, as well as the host activity's annual self ECE.

B. **Overseas.** At overseas activities, ECEs may be accomplished as a joint service effort in regions with multiservice installations. ECEs at overseas activities shall address host country laws of general applicability, SOFAs, DOD, OPNAV policies.

0607 ECE REPORT FORMAT. Paragraph 4-5.7 of OPNAVINST 5090.1A describes the standard format and checklists for ECEs developed by COMNAVFACENGCOM to address all Federal, state, and local environmental and natural resources requirements. Like an environmental cousin of a *JAG Manual* investigation, Part 1 of the ECE provides findings of fact which address factual material including background on the preparation of the ECE and information on the environmental activities determined to be in noncompliance; a list or table sorted by the governing environmental statutes and natural resources program elements; and appropriate citations. The findings of fact are supported by the various appendices on compliance. Part 2 of the ECE contains opinions and recommendations, based on the findings of fact, regarding overall compliance and means for corrective action. This part is more subjective and assists naval authorities in deciding what course of action to take to maintain or achieve compliance. The ECE will also project the total cost of compliance for the period in the six-year defense plan (SYDP).

0608 PUBLIC ACCESS TO ECEs. The potential treasure likely to be found in an ECE by someone bent on filing a citizen's suit makes these evaluations prime targets of informal discovery. The risk that the ECE report will become "Plaintiff's Exhibit #1," however, is significantly outweighed by the long-term benefits of the ECE program and infinitely preferable to the alternative of not conducting ECEs and remaining in the dark as to the extent of our noncompliance.

Environmental Compliance Evaluations

A. **Releases in general.** In most cases, the release of ECEs is governed by the Freedom of Information Act (FOIA) and SECNAVINST 5720.42E. Commanding Officers and heads of Navy and Marine Corps shore activities or their designees are authorized to release information under their control in response to a valid FOIA request. To be valid, a FOIA request must be in writing, state what information is desired with adequate particularity, reference the FOIA as authority for the request, and include an offer to pay for reproduction / search costs or request a waiver. The command must act on the request within 10 working days. Materials must be released unless a FOIA exemption applies and the release would jeopardize an important governmental interest.

B. **Finality.** Draft ECEs are working documents. As such, draft ECEs are not subject to release until approved by the authority who directed that the evaluation be conducted. Per paragraph 4-5.8 of OPNAVINST 5090.1A, ECEs shall not normally be kept in draft form for more than 60 days.

C. **Factual data.** As discussed above, Part 1 and the Appendices (checklist) of the ECE set forth factual matters. We anticipate these records will be released. As with any other FOIA request, portions of the factual data containing classified or sensitive unclassified information can be withheld.

D. **Opinions and recommendations.** Since Part 2 contains internal advice, recommendations, and subjective evaluations, it will usually be exempt from release as deliberative or predecisional material under FOIA exemption b(5). As with any other FOIA request, this must be treated as a denial. If received by a subordinate command, the request must be acknowledged and forwarded to the Initial Denial Authority (IDA) within 10 working days. The IDA is typically the general court-martial convening authority in the chain of command. More details are provided in SECNAVINST 5720.42E.

E. **Litigation.** FOIA controls the release of ECEs in the vast majority of cases. ECEs which are requested in the midst of existing or reasonably anticipated litigation, however, may be governed by SECNAVINST 5820.8A; Subj: RELEASE OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF THE NAVY (DON) PERSONNEL. This Instruction may apply even if the Navy is not now a party to the litigation. Navy JAG (Code 34) and the Office of General Counsel (OGC) share responsibilities over these matters and can provide guidance in specific cases. The phone number for Navy JAG (Code 34) is DSN 221-9870 or commercial (703) 325-9870. The phone number for OGC Navy Litigation Office is DSN 332-3205 or commercial (703) 602-3205.

0609 **ADDITIONAL READING.** For a detailed examination of this subject, see Colonel J. Michael Abbott, USAF, *Environmental Audits: Pandora's Box or Aladdin's Lamp?* 31 A.F. L. Rev. 225 (1989); Michael H. Levin, *Discovery and Disclosure: How to Protect Your Environmental Audit Report*, 24 Env'tl. Rep. No. 36, 1606 (Jan. 7, 1994).

CHAPTER VII

FUNDING ENVIRONMENTAL COMPLIANCE

0701 REFERENCES

- A. Executive Order 12088, Federal Compliance with Pollution Control Standards, (October 13, 1978) (Reprinted at Appendix B of *EPA Federal Facilities Compliance Strategy Manual*, November 1988, (The *Yellow Book*, pending revision)
- B. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 3
- C. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 3
- D. *Navy / Marine Corps Installation Restoration Manual* (1992)
- E. Department of the Navy Environmental Restoration Plan for Fiscal Years 1994-1998 (1993)
- F. Defense Environmental Restoration Program (DERP), 10 U.S.C. §§ 2701 *et seq.*
- G. Office of Management and Budget (OMB) Circular A-106, 31 December 1974 (Reprinted at Appendix G of *The Yellow Book*)
- H. The Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349-1351, 1511-1519
- I. Memorandum for Under Secretary of Defense for Acquisition of 30 Jul 92

0702 BACKGROUND

A. **Funding.** Funding for environmental compliance is based upon a variety of Federal laws which impose substantive environmental requirements upon

Federal agencies and waive sovereign immunity for state and local requirements. Generally, the state and local requirements are even more stringent than those imposed under Federal law. Failure to comply with environmental requirements is enforceable either by the regulator or by citizen suits. Reference (I) provides an extensive discussion relating to the legal requirements for environmental budgeting. Reference (b) provides a broad overview of the budget process.

B. ***Executive Order 12088*** makes it clear that the Executive agencies must be in full compliance with applicable laws and regulations: "1-101. The head of each Executive agency is responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under the control of the agency."

C. ***Funding for environmental compliance and cleanup activities comes from several sources:*** The Defense Environmental Restoration Account (DERA); Operations and Maintenance, Navy (O&MN) funds; the Military Construction Account; and the Base Realignment and Closure Account.

0703 DEFENSE ENVIRONMENTAL RESTORATION ACCOUNT (DERA)

A. ***Establishment.*** The Superfund Amendments and Reauthorization Act of 1986 (SARA) established the "Superfund" as a funding mechanism for environmental restoration projects in the civilian community where other funds were not available for cleanup operations. Congress established a similar program for funding military cleanup projects under the Defense Environmental Restoration Program (DERP), 10 U.S.C. §§ 2701 *et seq.* Funding is accomplished through the DERA, a transfer account, to carry out the functions of environmental restoration. See 10 U.S.C. § 2703.

B. ***DERP.*** The DERP provides centralized management for the cleanup of past contamination for toxic and hazardous substances, low-level radioactive materials and petroleum, oil and lubricants at DOD sites consistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by SARA, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and Executive Order 12580, Superfund Implementation. The Deputy Under Secretary of Defense (Environmental Security) (DUSD(ES)) centrally manages the account, develops and defends the budget, and allocates funds among the Army, Navy, Air Force, and Defense Agencies.

C. ***DERA.*** DERA shields installations from the immediate impact of funding environmental cleanups. Many remedial actions, however, require long-term execution to implement the remedy selected. Per current DOD policy, DERA will be

used to fund the operation and maintenance of remedial projects for ten (10) years. After that, operational expenses will be funded by the installation's O&MN money.

D. ***The Installation Restoration (IR) Program*** is the major element of DERP and is DOD's program meeting its responsibilities under CERCLA. The purpose of the IR Program is to identify, quantify, and clean up contamination at installations when necessary. The program is focused on cleanup of contamination associated with past activities. Each of the DOD components is implementing the IR program. The Corps of Engineers is tasked to clean up sites which are no longer owned or used by DOD. This program is known as the Formerly Used Defense Sites (FUDS) Program.

E. ***The Navy IR Program*** is budgeted for and managed by the Naval Facilities Engineering Command (NAVFACENGCOM) and its Engineering Field Divisions (EFDs). All sites on Department of Navy (DON) controlled properties, or any off-base area contaminated by the migration of hazardous substances from DON-controlled property, in the United States, its territories, or possessions, are included in this program whether or not they are on the National Priorities List (NPL). Overseas installations are not part of IR program funding or requirements. IR program funding priorities are established in references (c) and (d).

F. DERA funding can also be used for corrective actions at Solid Waste Management Units (SWMUs) under the Resource Conservation and Recovery Act (RCRA), as amended. RCRA provides for current and future hazardous waste management practices, as well as cleanup of past disposal sites at permitted or interim status Navy / Marine Corps installations.

G. Sites which have never been owned or operated by the DON, but to which the DON contributed hazardous substances are called third party sites. Under certain circumstances, third party sites are DERA eligible, but require actions distinct from those for IR sites. Reference (c) provides further guidance on the FUDS program and third party sites.

H. Certain activities related to Underground Storage Tanks (USTs) are also DERA eligible.

1. Studies to locate USTs not used since January 1984;
2. activities to determine whether a release has occurred from these abandoned tanks; and
3. responses to releases from in-service tanks discovered during initial integrity testing (leak detection monitoring) where testing was conducted prior to December 22, 1993.

Consolidated Environmental Law Deskbook

I. DERA is available to provide funding for civilian positions involved in the IR program at the installation level as well as for public affairs costs. In certain instances, DERA can also be used for travel related to the DERP program.

0704 OPERATIONS AND MAINTENANCE, NAVY (O&MN) FUNDS. A majority of environmental compliance costs used to be centrally funded through the Navy Environmental Compliance Account (NECA), which was administered by the NAVFAC EFDs. In October 1993, environmental compliance funding was decentralized and incorporated into the Other Base Operating Support (OBOS) portion of major claimants' budgets. Now, funding and responsibility for environmental compliance rests in the same chain of command.

0705 MILITARY CONSTRUCTION FUNDING

A. Military construction funds are required for construction of any environmental projects in excess of \$300,000.00. 10 U.S.C. § 2805(c)(1). Note that the constraints on funding and authority are not applicable to repairs to existing structures vice construction of a new facility.

B. "Unspecified" minor military construction projects with a maximum value of \$1.5M can be approved by the Service Secretary without first obtaining approval from Congress. Funding for "unspecified" construction is from an annual lump-sum appropriation from Congress. "Specified" military construction projects are those in excess of \$1.5M and are listed as specific line items in the DOD Military Construction Appropriations Act.

C. Installations submit construction projects to the major claimant through the chain of command. Projects are prioritized and forwarded to CNO N44. CNO N44 prioritizes the projects Navy-wide. The projects are then submitted to NAVCOMPT for review and coordination with OSDCOMPT who integrates them into the President's budget. This funding process takes two to six years.

0706 BASE REALIGNMENT AND CLOSURE (BRAC) ACCOUNT. Bases on the base closure list may also receive funding from the BRAC account. Environmental restoration efforts at bases being closed and realigned are to be funded from the BRAC account. COMNAVFACENGCOM is required to submit BRAC budget documents for all IR and closure-related environmental compliance costs, and all National Environmental Policy Act (NEPA) study costs, at closing and receiving bases. Compliance costs, not related to closure, even if located at a closing site remain O&MN costs.

0707

BUDGETING FOR COMPLIANCE

A. **Discussion.** As a result of the decentralization of compliance funding, the following discussion can only provide general information regarding budgeting and funding implementation. Each major claimant must be consulted for specific details within their chain of command. Two parallel but related processes are used for programming and budgeting for environmental compliance.

B. **Routine, recurring costs.** Routine, recurring costs typically include staffing, training, permit fees, and NEPA documentation. These costs are easily estimated and payable within the facility commanding officer's (COs) yearly operating budget. Accordingly, routine costs are to be included in the facility's O&MN or Navy Industrial Fund (NIF) budget which will then be submitted to the major claimant. These expenses generally are not submitted in the Pollution Control Report and OMB A-106 reporting process discussed in 0707.C. This portion of the budget is controlled by the Planning, Programming and Budgeting System (PPBS).

-- **The PPBS process** involves comptrollers, CINCS, assessment sponsors, and resource sponsors.

a. **The planning phase** is designed to define the national military strategy, project future requirements (two to eight plus years), and plan the force structure.

b. **The programming phase** is designed to bridge the gap between future planning and annual appropriations. It is during this phase that required capabilities are transformed into definitive programs. The Navy Program Objectives Memorandum (POM) and the Mid-Range Financial Plan are part of this phase. The Fiscal Year Defense Program (FYDP) spans six years. The POM becomes the starting point for resourcing the budget. It supports some program items and deletes others. In other words, if it is not in the POM, no funding will follow.

c. **The budget formulation stage** converts the POM into a budget. A budget is divided into separate appropriations. It involves congressional hearings and requires precise pricing and the most current execution data available. The emphasis is on the first two years of the plan. The end result is the budget that is passed by Congress.

C. **Nonroutine, nonrecurring costs.** Nonroutine, nonrecurring compliance projects include special studies, remedial actions, corrective actions, or one-time upgrades of infrastructure. Budgeting is accomplished pursuant to the Office of Management and Budget (OMB) A-106 process. OMB Circular A-106 is reproduced in Appendix G of the *Yellow Book*, Reference (G). Commanders and COs are required to submit pollution control reports (PCRs) in accordance with major

claimant procedures identifying all pollution control projects and programs needed to achieve and maintain environmental compliance for the next five (5) years. Ultimately, these costs will be charged against the O&MN account at the major claimant. NIF facilities will recoup these costs from the overhead portion of their budget.

-- Generally, the installation completes the PCR and submits it to the EFD for technical review of the both documentation and the assignment of priority (Class I, II or III). The PCR is then forwarded via the chain of command to the major claimant who then validates the project. Funding will then be provided based upon availability and priority. Copies of the PCRs are provided to the Naval Facility Engineering Service Center for entry into the A-106 database. COMNAVFACENGCOM uses the information to produce the Navy's A-106 report. Classification is based upon the following EPA guidelines:

a. **Class I:** Projects that are out of compliance, have been the subject of an enforcement action, or that involve a signed consent order or compliance agreement with EPA or a state government agency. EPA considers these projects to be of critical priority.

b. **Class II:** Projects that must be dealt with in an agency's current planning cycle to meet a compliance deadline in the immediate future. If projects in this class are not programmed for funding during the current budget cycle, they may be out of compliance before needed money can be provided.

c. **Class III:** Projects not directly related to an imminent compliance requirement, but are important to the agency. These projects included those needed to replace obsolete facilities, meet expansion needs, demonstrate environmental leadership, etc.

D. **Review.** In accordance with OMB Circular A-106 and section 3(a) of Executive Order 12088, Federal agencies then submit annual "Pollution Abatement Plans" (A-106 Report) to EPA for review. EPA reviews the projects at Regional Offices and EPA Headquarters. The adequacy and priority of each project is rated. EPA semiannually comments to Federal agencies on project priorities and provides an overall assessment of the adequacy of agency funding for environmental compliance to the Office of Management and Budget.

E. **Congressional interest.** Congress is dissatisfied with DODs performance in reporting its environmental compliance funding requirements. The FY91 DOD Authorization Act amended 10 U.S.C. § 2706 to require DOD to forward an installation-by-installation listing of environmental compliance requirements with the President's annual budget submission to Congress. "[K]nowing that their input on environmental funding requirements is going to subject [them] to Congressional

oversight will provide a greater incentive for base commanders to improve the accuracy and realism of their funding estimates." Pub.L.No. 101-510, National Defense Authorization Act For Fiscal Year 1991: Report of the House of Representatives Armed Services Committee on H.R. 4739, 101st Cong., 2nd Sess. 250 (1990).

0708 BUDGETING FOR FINES AND CIVIL OR ADMINISTRATIVE PENALTIES. The President's signing statement for the Federal Facilities Compliance Act of 1992 makes it clear that penalties for noncompliance are to be taken from the offending agency's appropriation. Navy's policy is to budget only for compliance. Any noncompliance penalties are to be shouldered by the installation.

0709 SHIPBOARD COMPLIANCE COSTS. Ship alterations performed to meet environmental compliance requirements shall be accomplished as part of the Fleet Modernization Program and are funded by OPNAV resource sponsors. Special studies, equipment, and research / development for new systems shall be budgeted by Commander, Naval Sea Systems Command (COMNAVSEASYS COM).

0710 THE ANTI-DEFICIENCY ACT (ADA)

A. The following discussion provides a very brief outline of the ADA. For a more comprehensive discussion, review the Fiscal Law Section of the *OGC Deskbook*.

B. The ADA is a key feature of the congressional power of the purse. Obligating the government to spend money not yet appropriated usurps that congressional power. The ADA prohibits any officer or employee from making or authorizing either an obligation or an expenditure in excess of the amount available in an appropriation or fund. Nor can there be an obligation in advance of appropriations unless authorized by law. Violation of the ADA can result in administrative discipline, including suspension without pay, removal from office, or criminal prosecution.

C. Consequently, a CO is prohibited from entering into a consent order which contains an unconditional obligation to install pollution control equipment or otherwise spend money in future fiscal years. There are many ways to build financial flexibility into the delayed compliance schedule. The following clauses illustrate typical approaches.

1. "Subject to funding that Congress authorizes for the project."

2. "Subject to funding that Congress authorizes for the project," coupled with a commitment to request such funds.

3. "Subject to the availability of funding allocated to the installation that can be used for the project," coupled with a commitment to request funding from Congress.

D. Congress also prohibited the augmentation of Federal appropriations from any source (e.g., we can't sell hot dogs to raise money to clean up the installation). The prohibition includes the acceptance of voluntary services. Voluntary services are services which are not performed under contract, but for which there is a quasi-contractual right to compensation. Gratuitous service is distinguished from voluntary service and is not prohibited. Careful analysis is required when working with environmental / community groups who may be assisting with environmental projects at an activity.

CHAPTER VIII

REPORTING VIOLATIONS

0801 REFERENCE

- A. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 1
- B. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch.1 and App. D

APPENDICES

- (A) Initial Notification Format (reprinted from OPNAVINST 5090.1A, Appendix C)
- (B) Format for Follow-up Messages (reprinted from OPNAVINST 5090.1A, Appendix C)

0802 BACKGROUND. The thousands of Federal installations—situated on millions of acres of Federal land—are subject to seemingly innumerable Federal, state, and local environmental requirements, both substantive and procedural. Try as we might, our efforts occasionally fall short of full compliance. When regulators detect suspected violations of these requirements, they let us know. Federal EPA officials may issue Notices of Noncompliance (NON); state and local officials may issue Notices of Violation (NOV). In addition, commanders may receive warning letters, warning notices, citizen suit notices, consent orders, or any number of other notices of deficiency under various labels. This chapter outlines responsibilities and required action in the event we receive these notices. Adherence to these requirements helps ensure the matter receives the proper attention and is resolved in a manner consistent with environmental laws, with minimum adverse impact on mission accomplishment.

0803 RESPONSIBILITIES OF THE NONCOMPLIANT COMMAND. Upon receipt of *any* NON, whether oral or written, formal or informal, the commanding officer shall harness the technical and legal expertise needed to respond.

Commanders can draw on support from command environmental technical personnel, the command staff judge advocate, the cognizant Regional Environmental Coordinator (REC) Counsel, or Navy Office of General Counsel (OGC) attorney. Additional technical and legal assistance is available from major claimants and from the cognizant Engineering Field Division (EFD) of Naval Facilities Engineering Command (NAVFACENGCOM). Having assembled the necessary support, the commander can fulfill the following requirements, triggered by receipt of any NON, in whatever form and by whatever name.

A. ***Initial notification.*** The command must provide initial information on each NOV, NON, written or oral citation, etc., they receive. Using the message format in Appendix C to OPNAVINST 5090.1A, the command must notify CNO—with information copies to: the chain of command; Office of the Assistant General Counsel (Installations and Environment) (OAGC (I&E)); COMNAVFACENGCOM; the appropriate EFD; Naval Facilities Engineering Service Center (NFESC); and the REC. The initial message shall be sent upon receipt of the citation. One message may be used to report violations in more than one media as a result of multi-media inspections. The required format has been reproduced in appendix A to this chapter.

B. ***Preliminary inquiry.*** The command must conduct a preliminary inquiry into the facts and circumstances of the violation, obtain legal and technical support, and take corrective action. If asked to pay a fine or penalty, the command will prepare a written investigative report per procedures established by the major claimant or delegated representative. The investigative report shall cover the facts and circumstances of the incident and include such documents, statements, photographs, claims for damage, notice of fine or penalty, and further details as may be required in the particular case. The report may be prepared as a *JAG Manual* investigation or a letter report. The command forwards the report to the major claimant via the chain of command—with copies to OAGC (I&E), NFESC, the REC, the appropriate NAVFACENGCOM EFD, and CNO (N457), Shore Compliance Branch.

C. ***Follow-up notification.*** Every initial notification must be amplified in at least one follow-up message. The first follow-up message should be sent as soon as the information specified in the format is known. In any event, the follow-up message containing additional details shall be sent not later than six months after the command received the initial NOV. After that, follow-up messages are required every six months from the receipt of the NOV until the issuing agency considers the NOV resolved. For user convenience, the required format for follow-up notifications is also reproduced in appendix B to this chapter.

D. **Agency response.** While this chapter primarily discusses internal reporting requirements, the command must still prepare all necessary responses to pollution control agencies per policies provided in this Deskbook and OPNAVINST 5090.1A.

E. **Fines and penalties.** As a matter of policy, EPA does not impose money penalties on Federal facilities except as provided in the Federal Facilities Compliance Act (FFCA), and to enforce the terms of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Interagency Agreements (IAGs). State regulatory agencies, however, may assess penalty payments. Commands shall not pay fines or penalties for violation of environmental laws and regulations without first seeking the advice of legal counsel.

1. The commander must consult with on-site or command counsel. If no factual or legal defense exists, we try to negotiate the lowest possible penalty, arrange for payment, and advise all addressees in paragraph 0803A above by message. Payments are made from the operating funds of the activity or major claimant.

2. If a defense exists, the command will forward the investigative report to the major claimant via the chain of command, copy to Navy OGC (ELO), with their recommendation that the fine or penalty be contested. When the recommendation to contest the violation or noncompliance is rejected, negotiation for payment as discussed above will begin at the local level.

F. **Final Notification.** When all the issues for a specific NOV are resolved and the issuing agency considers the action complete, the command will send the final follow-up notification detailing all the particulars to all addressees.

0804 MAJOR CLAIMANT RESPONSIBILITIES. To monitor compliance effectively, major claimants must maintain a list of all pending NOV's or other notices received by activities under their command. Claimants shall compare their list to the DOD Compliance Status Report which is published quarterly by the EPA Office of Federal Activities (OFA). Claimants shall report discrepancies between the two to OFA by letter.

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APPENDIX A

INITIAL NOTIFICATION FORMAT

FM: NAVY ACTIVITY/SHIP//CODE//
TO: CNO WASHINGTON DC//45//

INFO: CHAIN OF COMMAND
LEGSVCSUPPGRU OGC WASHINGTON DC//ELO//
REGIONAL ENVIRONMENTAL COORDINATOR//JJJ//
NEESA PORT HUENEME CA//112//
COMNAVACENGCOM//18//
NAVACENGCOM EFD//JJJ

//UNCLAS//NO05090//

SUBJ: RECEIPT OF NOTICE OF ENVIRONMENTAL NONCOMPLIANCE

MSGID/GENADMIN/ORIGINATOR//CODE//
REF/A/DOC/OPNAVINST 5090.1A//
RMKS/

1. Activity or ship name in violation.
2. Navy UIC number.
3. Activity address / ship homeport.
4. City (for ships, where violation occurred).
5. State (use 2-letter state abbreviations).
6. County.
7. Point of contact for additional information.
8. POC telephone number.
9. EPA region.

10. Was an NOV received (yes or no)?

For this purpose, an NOV is any formal written notification by the EPA or an authorized state or local environmental regulatory agency of a violation or violations of law or regulation which applies to the regulatory agency's first level of enforcement action. Warning letters or notices of deficiencies are not NOVs, but are to be included on line 12.

If the NOV cites violations under several media, treat them as multiple NOVs—one under each of the applicable medial categories. Only one message is required, but the specific information required must be included for each media. Generally, lines 1 through 14 of the message will be the same for the different media violations that result from a multi-media inspection. Lines 15 through 24 will be repeated and tailored for each violation in the different media cited. The media are listed in the chart at the end of this appendix.

One written notice, regardless of the number of individual violations, findings, or citations counts as one NOV. Do not include on line 10 items found to be out of compliance by a regulator, but not set forth in writing.

11. Violation description, other than NOV.

This might include, for example, NONs, warning letters, regulatory agency inspectors reports identifying deficiencies, oral inspection outbriefs. Violations involving more than one media are to be handled in the same manner as NOVs.

12. Name of issuing agency and violation number(s).

13. Date of notification (mm/dd/yy).

This is the date that the NOV, etc., was initiated by the regulatory agency, preferably the date on the letterhead.

14. Date of inspection (mm/dd/yy).

This is the date of the inspection during which the violation was detected. If the inspection took several days, use the date noted on the NOV, etc., or, if none, use the date the inspection started.

15. Media.

This refers to the law under which the violation was issued. Refer to the table at end of Appendix B for the codes.

16. Specific section of regulation or act cited.

17. Permit numbers related to the violation.

18. Total number of individual findings issued by the regulatory agency.

A "finding" is a specific violation with citation of environmental law or regulation.

19. List each violation separately and classify into one of the following (list should equal total in item 18):

Class A. Releases to the environment.

Class B. Violations with the potential to cause a release or damage.

Class C. Administrative violations. A specific violation, citation, or finding which occurs as a result of improper paperwork, report filings, or labeling. This does not include paperwork associated with permit applications.

20. Was a fine assessed or requested?

21. Total dollar amount of fines assessed.

22. Summary of demand for payment.

23. Was a compliance agreement, negotiation, or agreement requested by the regulatory agency?

24. Summary of proposed agreement or schedule.

25. Additional information

Unusual circumstances or events leading to NOV should be discussed here.

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APPENDIX B

FORMAT FOR FOLLOW-UP MESSAGES

FM: NAVY ACTIVITY/SHIP//CODE//
TO: CNO WASHINGTON DC//45//

INFO: CHAIN OF COMMAND
LEGSVCSUPPGRU OGC WASHINGTON DC//ELO//
REGIONAL ENVIRONMENTAL COORDINATOR//JJJ//
NEESA PORT HUENEME CA//112//
COMNAVFACENGCOM//18//
NAVFACENGCOM EFD//JJJ

//UNCLAS//NO05090//

SUBJ: FOLLOW-UP REPORT OF NOTICE OF ENVIRONMENTAL
NONCOMPLIANCE

MSGID/GENADMIN/ORIGINATOR//CODE//
REF/A/DOC/OPNAVINST 5090.1A//
REF/B/DTG OF INITIAL MESSAGE/VIOLATION NUMBER//
RMKS/

1. Activity or ship name in violation.
2. Navy UIC number.
3. Activity address / ship homeport.
4. City (for ships, where violation occurred).
5. State (use 2-letter state abbreviation).
6. County.
7. Point of contact for additional information.
8. POC telephone number.
9. EPA region.
10. Was a fine paid? Yes or no.

Consolidated Environmental Law Deskbook

11. Dollar amount of fine paid.

12. DERA paid.

This is the total dollar amount of fines disbursed out of the Defense Environmental Restoration Account for CERCLA violations.

13. Was compliance agreement, negotiation, or schedule accepted? Yes or no.

14. Date of agreement (mm/dd/yy).

15. Is the compliance agreement closed (i.e., resolved to the satisfaction of the issuing agency)?

16. Financial obligation resulting from the compliance agreement.

17. Fiscal year(s) for which the financial obligations have been incurred.

18. Dollar amount and appropriation of projected costs resulting directly from compliance agreements.

19. Is the NOV resolved? Yes or no.

To be resolved, an NOV must be resolved to the satisfaction of the issuing agency. All individual findings, violations, or citations within the NOV must be resolved for the NOV to be considered resolved for the purposes of this report.

20. Date of resolution (mm/dd/yy).

21. Has the issuing agency concurred with resolution of the issues and removed the violation from their active files? Yes or no.

22. Date of concurrence (mm/dd/yy).

This is the date on which the regulatory agency confirms, orally or in writing, that all findings are resolved.

23. Expected completion date for issues not immediately corrected (mm/dd/yy).

24. Summary of reasons for not resolving the issues.

25. Is a compliance project required to achieve compliance with NOV?

26. Has project / PCR exhibit been submitted to the major claimant and/or EFD?

If MILCON is required, provide the project number and program year.

27. A-106 project number.

This is the unique identification number assigned to the project in the A-106 Project Report Form. Include only those A-106 projects that have either of the following two compliance status codes: CMPA (required to meet conditions of a signed Federal Facility compliance agreement, consent order, or equivalent state or local enforcement action); or INOV (required to meet deficiencies found on inspections by regulatory authority or cited in an NOV or equivalent).

28. Additional information.

Media Codes

Clean Air Act: A

Clean Water Act: W

Safe Drinking Water Act: S

Resource Conservation and Recovery Act

 Subtitle C: Hazardous wastes: C

 Subtitle D: Nonhazardous solid wastes: D

 Subtitle I: Underground storage tanks: I

Toxic Substances Control Act: T

Comprehensive Environmental Response: R

Federal Insecticide, Fungicide and Rodenticide Act: F

Endangered Species Act: E

Historic Preservation Act: H

Archaeological Protection Act: R

Other: Z

CHAPTER IX

ENVIRONMENTAL LITIGATION

0901 INTRODUCTION. Many of the substantive chapters in this Deskbook include discussions of litigation under a specific statute. This litigation may take many forms from a civil action to hold a federal official personally liable for environmental wrongs to a citizen's suit to enforce federal compliance with a statute or regulation. The spectre of litigation tends to freeze command action and may hamper mission accomplishment. While other chapters in this Deskbook seek to promote compliance (the best insurance against litigation), this chapter provides an overview on what litigation generally entails. The aim here is to assist judge advocates (JA's) in understanding the litigation process, suggest practices which will improve our litigation posture, and identify litigation support roles.

0902 TYPICAL LITIGATION CHRONOLOGY

A. **Filing.** The case begins when the plaintiff files a complaint, typically in the federal district court having jurisdiction over the command. The plaintiff may be an environmental group, a concerned citizen, or a state or local government. Under the unitary executive principle, EPA does not bring suit against fellow Federal agencies. The prevailing view is that the intra-executive suit would not present a judicial case or controversy. Some environmental statutes include a requirement that notice of intent to file suit must be given 60 days before the suit may be filed.

B. **Service.** The plaintiff serves the defendants with the summons and complaint. If the Secretary of the Navy (SECNAV) gets served, the "hired guns" will call you. The litigation will be handled by the attorneys dedicated to this mission in the Navy Litigation Office, Office of the General Counsel (OGC) of the Navy. If the command is served instead of SECNAV, or if the command receives a 60-day notice of intent to file suit, *immediately* notify the Navy Litigation Office at (703) 602-3176.

C. **The clock starts.** Once service is properly made, the time to respond starts to run. In Federal court, the government generally has 60 days to answer or otherwise respond, unless the plaintiff seeks a temporary restraining order (TRO) or preliminary injunction (PI). If the lawsuit commences with a motion for a TRO or PI, the time for initial response is likely to be highly compressed, perhaps down to only

a few days or hours. In lawsuits filed in state or local courts, the government may have a much shorter time to answer or respond to the complaint; it is therefore critical that the Navy Litigation Office be immediately notified of any suit filed against the Department of the Navy (DON) in state or local courts.

D. **Data gathering.** The command will have to educate Navy Litigation Office and Department of Justice (DOJ) lawyers on the facts of the case. This typically includes the identification of witnesses, location of documents and other evidence, providing briefings and coordinating visits for trial attorneys. Command counsel and JAs may also be called upon to assist with legal research and preparation of memoranda discussing the legal rationale(s) underlying the decisions or project, program, and mission attributes that give rise to the issues or controversy. Commands will frequently be called upon to provide this and other types of information through the assembly of a litigation report. This is one area in which the thorough maintenance of an administrative record, discussed below, will be especially helpful.

E. **TRO / PI hearings.** If the plaintiff seeks injunctive relief, a public hearing will usually be held in federal district court. Counsel for each side will usually have an opportunity to brief their positions. If time permits, declarations (similar to affidavits), normally produced with substantial drafting and coordination by the attorney for the command which has been sued, may be introduced to rebut the factual claims made by plaintiffs in their moving papers. TRO / PI decisions are typically rendered quickly, based on the administrative record, counsel's briefs, and arguments. Courts can and do hold *ex parte* hearings on TRO applications; so when a challenge to a scheduled project or event is anticipated, it is essential that the Navy Litigation Office be contacted as early as possible in order to make preparations to defend against the TRO *before* the suit is filed.

F. **TRO / PI appeals.** The loser in district court may appeal to the cognizant U.S. Circuit Court of Appeals. Counsel file briefs, but no new evidence is presented. The courts of appeals may, but do not always, hear oral argument on appeals; some cases are decided on the basis of the appellate briefs filed by the parties. The decision is rendered on the record of proceedings in district court and the briefs and arguments of counsel.

G. **Motion to dismiss.** In appropriate cases, DON, usually before filing its answer to the complaint, will file a dispositive motion, the first of which is a motion to dismiss the complaint or some portion thereof. A motion to dismiss will be accompanied by our brief in support of the motion. The opposing party will file its opposition to the motion to dismiss, and we will have an opportunity to file a reply. Command input supports the "Statement of Facts" section of the brief. The U.S. district courts usually, but do not always, hear oral argument on motions to dismiss.

If we prevail on the motion, plaintiff may appeal. (Note: A motion to dismiss may be combined with a motion for summary judgment.)

H. **Motion for summary judgment.** In appropriate cases, DON may file another type of dispositive motion (i.e., a motion for summary judgment as to all or some portion of the complaint). A motion for summary judgment will be accompanied by a brief in support of the motion. The opposing party will file its opposition, which may include a cross motion for summary judgment, to our motion. Both sides may support their positions on summary judgment motions with affidavits or declarations. Declarations in support of a motion for summary judgment are ordinarily provided by command personnel, with the advice and assistance of command attorneys and Navy Litigation Office trial attorneys. In essence, the facts are not disputed in a motion for summary judgment; we argue that our interpretation of the law as applied to the facts alleged dictates that we would prevail on the merits. Denial of a motion for summary judgment is not normally appealable; but where summary judgment finally disposing of a case is granted, the loser may appeal. (Note: A motion for summary judgment may be filed before or after the answer is filed.)

I. **The answer.** If the case is not concluded as the result of a dispositive motion, DON must file an answer to the complaint. The need to respond to the factual allegations in the complaint typically requires detailed command assistance. Local JAs and OGC attorneys play a key supporting role.

J. **Discovery.** While there may occasionally be some discovery in connection with a motion for summary judgment, the main discovery phase of the litigation begins after the answer is filed. Command personnel will again be called upon to play a critical supporting role in identifying, locating, and providing documents for production, answers to interrogatories, and witnesses for deposition. An attorney or attorneys representing DON will be present at all depositions of Navy or Marine Corps witnesses.

K. **Settlement.** As a general proposition, a lawsuit against DON, like any lawsuit involving any other litigants, may be settled at any point in the proceedings. Our willingness and ability to engage in settlement negotiations in a particular case will depend upon many factors, including the cost of maintaining the litigation, the risk of an adverse outcome, the strength of our legal and factual position, potential project or mission delays, the relative position of other military departments or Federal agencies and officials who may be the co-defendants, and administration policy with respect to issues in the lawsuit.

L. **Trial.** It is unusual for environmental cases to get this far. DON's experience in environmental litigation is that cases more typically come to an end through a negotiated settlement or as the result of a dispositive motion. Cases that do go to trial may be tried on the basis of the administrative record that documents

the decision being challenged, while others may require the testimony of witnesses and introduction of exhibits. Here again, the losing party may appeal.

M. **Appeals.** Either party may appeal the result of trial. When DON is the losing party in the district court, authority to appeal to the U.S. Circuit Court of Appeals must be obtained from the Solicitor General of the United States. Coordination of appeal recommendations is the responsibility of the Navy Litigation Office.

0903 LITIGATION SUPPORT

A. **U.S. DOJ.** The Attorney General of the United States has the authority and responsibility to represent the United States, including DON, in virtually all litigation in which the Navy or Marine Corps (or officers, agents, or employees thereof) is a party. DOJ attorneys who may be assigned to represent DON include attorneys located at main DOJ in Washington, D.C., DOJ field offices, and U.S. Attorney Offices throughout the country.

B. **GC of the Navy.** DON's environmental litigation trial attorneys are located in the Navy Litigation Office, OGC. These attorneys are responsible for coordinating all Navy support to DOJ in environmental litigation, and in most cases the assigned Navy Litigation Office trial attorney is the single point of contact with DOJ. Questions about environmental litigation may be directed to:

NAVY LITIGATION OFFICE
GENERAL COUNSEL OF THE NAVY
2221 JEFFERSON DAVIS HIGHWAY SUITE 1000
ARLINGTON VA 22244-5301
DSN: 332-3250 ext 500
COM: (703) 602-3250 ext 500
FAX: (703) 602-3245

C. **Staff judge advocate / command counsel role.** Teamwork is critical to successful environmental litigation. While the Navy Litigation Office is responsible for coordination, communication, and litigation matters involving DOJ, opposing counsel, and the court, command counsel and local JAs typically coordinate matters locally and provide day-to-day pre-litigation advice. When litigation arises, they constitute an important link between the factual history and legal development of the dispute and the ability to defend our position in a coordinated, coherent, and convincing way. The legal and factual dimensions of a given case can be presented to our best advantage only if the two teams work together.

0904

THE ADMINISTRATIVE RECORD

A. **Significance.** An administrative record is often critical to successful environmental litigation. Generally, review on the administrative record allows the agency to prevail unless our decision is shown to be arbitrary, capricious or contrary to law. A complete administrative record can avoid burdensome discovery battles and depositions of senior officials. Attention to detail here will also help contain showcase trials and grandstanding plaintiffs. A complete administrative record is particularly important in National Environmental Policy Act (NEPA) litigation.

B. **Mandates.** Some environmental statutes specify that an administrative record be maintained. Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) section 113(k)(1), (42 U.S.C. § 9613(k)(1)) for example, selection of the response action must be on the record: "[t]he President shall establish an administrative record upon which the President shall base the selection of a response action." This is crucial where we anticipate a challenge to our selection of remedy.

C. **Contents.** To a large extent, the administrative record is what the agency says it is. Some statutes require that a "docket" be kept or set out what the record must contain [e.g., Clean Air Act (CAA) section 307(d)(42 U.S.C. § 7607(d))(rulemaking for National Ambient Air Quality Standards (NAAQSs) and Clean Water Act (CWA) section 402 (33 U.S.C. § 1342)(public hearing on National Pollutant Discharge Elimination System (NPDES) permit)].

1. The administrative record is limited to the materials before the decision maker *at the time the decision was made*. We will generally be bound by the record in existence; we cannot gun-deck the record with *post hoc* rationalizations compiled long after the fact.

2. The administrative record must include evidence and materials on all factors required to be considered by the governing statute and all materials actually relied on for the decision. A properly maintained record will show that the actions were within the scope of the decisionmaker's authority and were justifiable under the applicable standard.

3. Unless required by statute, the decisionmaker does *not* necessarily have to consider every piece of paper or material on rejected alternatives. Nevertheless, where two sides are considered and one is rejected, a well-kept record will show that the failed alternative was duly considered.

4. Privileged material need not be included. Protected materials include, for example, classified information, attorney-client privilege materials, and attorney work product.

5. Courts may order an agency to supplement an administrative record when the record is incomplete (e.g., unconsidered alternatives, existence of controversy, etc.) or to show *ex parte* contacts, improper influence, etc.

D. *Management practices*

1. Organized management practices can help build a record to support Navy / Marine Corps decisions. Keep a record of contacts with concerned groups, both supporters and opponents. Keep thorough records of materials and information released to individuals or groups, including materials released under the Freedom of Information Act (FOIA) or other procedures. Ensure that critics are given the opportunity to comment, that their comments are given appropriate consideration, and that you can prove it (return receipt, etc.). Applicable statutes and regulations should be used as checklists to ensure that all required factors are covered.

2. Where the administrative record in question is not the responsibility of DON, good record-building practices can help influence or challenge regulatory or enforcement proceedings in which we have an interest. Don't miss an opportunity to comment, and request more time to comment if needed. Where possible, insist on responses to your comments. Try to develop a persuasive theme early. Make the administrative record compelling. A well organized record will be more useful than a haphazard compilation of unexplained documents.

E. *Precedent*. The following cases illustrate the significance of the administrative record in environmental litigation.

1. *Asarco, Inc. v. United States EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980) (Court ordered supplement to explain the administrative record).

2. *Camp v. Pitts*, 411 U.S. 138 (1973) (Administrative record should be based on the record in existence, not some *post hoc* rationalization compiled long after the fact).

3. *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (Administrative record should include evidence / materials on all factors required to be considered by the governing statute; Court rejected the litigation affidavits submitted by Secretary of Transportation as *post hoc* rationalizations).

4. *Greenpeace U.S.A. v. Evans*, 688 F.Supp. 579 (W.D. Wash. 1987) (Administrative record deficient because it did not show that the agency considered exception).

0905

RECOMMENDED DOs AND DON'Ts

A. Don't be surprised if someone files an environmental law suit against your command. Full compliance is no guarantee against litigation. Litigation is becoming an occupational hazard. Be sensitive to the issues but don't lie awake at night worrying about it.

B. If sued, get into compliance as soon as possible. Under some citizen suits, achieving compliance within the 60-day notice period will deprive the court of jurisdiction. If it doesn't make the suit "go away" altogether, compliance may minimize damages ultimately awarded.

C. Conduct a good public relations campaign. Treat all questions and comments from individuals, interest groups, public officials, and the press seriously and respectfully. Coordinate all press releases and responses to comments or questions from the foregoing with the Navy Litigation Office. Don't say anything to anyone that might come back to haunt you—offhand remarks often must be explained or justified later, and they can damage a sound litigating position.

D. Advise command personnel not to communicate directly with opposing counsel. All command communications in connection with the litigation should be made through the attorneys representing DON. Urge the command to conduct business as usual unless the court or you advise them to the contrary.

E. Command counsel must keep copies of all correspondence. Respond promptly to requests for information and assistance from litigation attorneys. Give litigation attorneys everything that may have a bearing on the case. Err on the side of too much information.

F. Keep the lines of communication open between the command, command counsel, and litigation attorneys. Keep each other apprised of new developments. Don't be afraid to ask questions.

CHAPTER X

**PERSONAL LIABILITY FOR
VIOLATION OF ENVIRONMENTAL LAWS**

1001 REFERENCES

- A. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2879
- B. Department of Justice (DOJ) Representation, 28 C.F.R. Parts 15, 5015, and 5016
- C. Removal to Federal Court, 28 U.S.C. § 1442
- D. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 1
- E. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 1

APPENDICES

- (A) Summary of Environmental Statutes
- (B) Prosecutions of Federal Employees for Environmental Crimes

1002 BACKGROUND. While most enforcement actions for environmental violations are taken against military installations as an institution, military members and civilian employees may be personally liable both civilly and criminal for violation of environmental laws. Civil liability generally requires an individual to pay money damages or a financial penalty from personal resources. Criminal penalties include imprisonment and / or fines.

1003 CIVIL LIABILITY. Personal civil liability may arise from environmental noncompliance in three ways: damages for tortious conduct, civil

penalties provided for in environmental statutes, and, potentially, environmental cleanup costs as an operator of a facility.

A. **Torts.** Under common law principles, one may be liable to pay money damages for death or injury to another person or damages to another's property which are caused by acts or omissions. All major environmental statutes create legal duties. In the large majority of cases, Federal agencies must comply with those duties just like any citizen. Any breach of those obligations, either willfully or negligently, which causes injuries or damages a person or property may constitute a tort making the individual responsible for the breach liable for damages. It is easy to imagine how a breach of any one of the multitude of environmental requirements could cause injury or damage—failure to properly label hazardous waste, failure to segregate or properly dispose of hazardous waste, causing contamination that creates health problems, etc. In *Westfall v. Erwin*, 484 U.S. 292 (1988), for example, an Army employee who suffered chemical burns when he inhaled soda ash dust that was stored in the depot where he worked brought suit against his co-workers and supervisors for negligence in storing and handling the material.

B. **Civil Penalties.** Another potential basis for liability is contained in the environmental laws themselves. These laws permit the imposition of civil penalties for violations of Federal or state laws, regulations, permits, or orders (Clean Air Act (CAA), 42 U.S.C. § 7418; Clean Water Act (CWA), 33 U.S.C. § 1323; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6961; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-6). While we normally are concerned about our installations' liability for civil penalties, they can be assessed against individuals as well. Fortunately, these laws expressly provide that such penalties do not apply to the conduct of officers, agents, and employees of the United States arising out of official duties. Thus, liability will exist only for violations arising from conduct that is not within the scope of official duties. The decision to pursue civil penalties and the amount of the penalty are matters within the discretion of the regulatory agency. Civil penalties are assessed on a strict liability basis.

C. **Cleanup Costs.** The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) makes the following parties liable for cleanup costs: (1) the owner and operator of a vessel or facility; (2) any person who owned or operated a facility at the time when hazardous substances were disposed of; and (3) any person who arranges for disposal or treatment, or for transport for disposal or treatment of hazardous substances. 42 U.S.C. § 9607. A broad reading of this provision could make a commander personally liable for the cost of cleanup of released hazardous substances. Such an interpretation has been used successfully by the United States to assert that individual corporate officials with direct participation in decision-making regarding hazardous substances are directly liable under CERCLA. A large majority of case law at the trial and appellate level has supported that position. See, e.g., *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C.

1985); *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986); *United States v. Northern Plating Co.*, 670 F.Supp. 742 (W.D. Mich. 1987). While a lawsuit seeking cleanup costs has not been filed against a Federal official, the potential exists to analogize from corporate cases and file such a suit. Liability under CERCLA is strict; that is, without regard to fault or willfulness. Liability is also joint and several. In virtually all cases brought against an official, the United States would also be liable and would be available to satisfy a judgment.

1004 DEFENSES TO CIVIL LIABILITY. Some lawsuits, though filed against a named individual, are brought against the official in his / her official capacity. Such a lawsuit targets the United States, and the assets used to satisfy a judgment would come from the U.S. Treasury. Even in those cases that target an individual's personal assets, the law affords limited protection to officers and employees of the Federal Government; however, all defenses require at a minimum that the employee was acting within the scope of official duties.

A. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Pub. L. No. 100-694, 28 U.S.C. § 2679) directs that the United States be substituted as the party defendant in any case against an officer or employee upon certification by the Attorney General that a defendant employee was acting within the scope of his / her office or employment at the time of the incident from which the claim arose. The Federal Tort Claims Act (FTCA) (28 U.S.C. §§ 1346, 2671-80) also provides that a judgment (or settlement) against the United States under the FTCA bars entry of a judgment against the Federal employee whose conduct gave rise to the action.

B. **Governmental immunity.** Federal officers and employees are immune from lawsuits based on actions taken within the scope of official duties and lawsuits filed by servicemembers.

1. Official immunity was created by the courts to protect judges, prosecutors, legislators (absolute immunity), and executive department employees (for acts in the performance of duties, qualified immunity). Qualified immunity is designed to protect Federal officials from insubstantial lawsuits and from the burdens of having to go to trial. It is an immunity from lawsuit rather than a mere defense. Denials of qualified immunity are immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

2. There is also intra-military immunity otherwise known as the *Feres* doctrine which precludes lawsuit for injuries to service personnel where the injuries arise out of or are in the course of activity incident to service. *Feres v. United States*, 340 U.S. 135 (1950). The doctrine applies to lawsuits by members of the uniformed services against the United States, other servicemembers, or civilian employees.

1005 CRIMINAL LIABILITY. All Federal officials are subject to Federal and state criminal laws, and there is a trend toward increased investigation and prosecution of environmental crimes. Individuals are expected to know and comply with environmental laws. Many environmental crimes do not require proof of an intent to break the law. Theoretically, responsible officials can be liable for the conduct of other persons. Appendix B lists Federal officials prosecuted to date.

A. **State of mind.** Environmental statutes provide for felony and misdemeanor sanctions. Congress and the states have incorporated various mental elements in the statutes. Some, like the Clean Water Act, can be violated by mere negligence. Other statutes, like the Rivers and Harbors Act, impose strict liability without regard to the mental state. Felony convictions require proof that the defendant acted knowingly; however, because environmental laws are classified as public welfare statutes, knowing violations merely require proof of a general intent to do the act that gave rise to the violation. They do not have to prove you knew what the law was or that you intended to violate it. Finally, the most serious offenses are those involving "knowing endangerment"; that is, an act performed knowing that it may place persons in imminent danger of death or serious injury.

B. **Liability for others.** The Supreme Court has ruled that a responsible corporate officer in a position of responsibility can be criminally responsible for someone else's conduct violating a public welfare statute if he / she had the responsibility and authority to prevent or to promptly correct a violation and failed to do so. See *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943). Most environmental statutes have been held to be public welfare statutes. Consequently, knowledge of environmental regulations is presumed and lack of knowledge of a particular violation may not be a defense.

C. **Strict liability.** In a few instances, Congress has proscribed conduct irrespective of the defendant's intent. The Rivers and Harbors Act, for example, outlaws discharges into navigable waters without regard to intent (33 U.S.C. § 407). Likewise, intent is not an element of violations of the Migratory Bird Treaty Act (16 U.S.C. §§ 703 *et seq.*).

D. **Immunity.** There is no immunity to Federal prosecution, and immunity from state prosecution is very limited. Because states cannot be allowed to prevent

a Federal officer from performing his duties, a Federal officer is immune from state criminal prosecution for acts committed within the scope of his duties where the officer has an honest and reasonable belief that the acts were necessary and proper for performance of his duties.

E. **Sentencing guidelines.** The adoption of Federal sentencing guidelines will result in stiffer sentences for future prosecutions.

F. **Factors in Department of Justice (DOJ) prosecution decisions.** DOJ's policy is to encourage self-auditing, self-policing, and voluntary disclosure of environmental violations. For purposes of deciding whether to prosecute an individual, the following activities are viewed as mitigating factors: voluntary, timely and complete disclosure; full and prompt cooperation; adequate preventive measures / compliance programs; and the existence of an environmental audit program. Other factors are pervasiveness of noncompliance, internal disciplinary action, and subsequent compliance efforts.

1006 LEGAL REPRESENTATION

A. **Official capacity suits.** Pursuant to 28 U.S.C. §§ 516-519, the Attorney General and DOJ are responsible for representing the interests of the United States in litigation. The DOJ represents Federal officials sued in their official capacity in connection with their duties. Since it is U.S. interests at stake, no formal request for personal representation is required in such cases.

B. **Personal capacity suits.** Although there is no obligation to represent Federal employees who are personally sued for money damages in their individual capacity, it is the policy and practice of the DOJ to provide such representation for those actions taken within the scope of employment / duties. Case law recognizes that the DOJ advances the interests of the United States when it represents its employees who are personally sued for actions taken within the scope of their employment. *Booth v. Fletcher*, 101 F.2d 676 (D.C. Cir. 1938).

1. An official sued in his / her individual capacity must submit a written request for representation via the chain of command. Supporting factual material should be attached. The actions giving rise to the suit must reasonably appear to have been performed within the scope of Federal employment, and it must be in the interests of the United States to provide representation.

2. The DOJ receives recommendations from the Navy and Marine Corps, but is responsible for determining whether to grant representation. See 28 C.F.R. §§ 50.15, 50.16.

3. Federal employees / officials may retain private counsel at their own expense to represent their interests at any time. They are not required to request or accept DOJ representation.

C. **Federal prosecutions.** The DOJ will not represent Federal officials or pay for representation in such cases.

D. **Costs of defense.** Authority exists to reimburse Federal employees for reasonable defense costs incurred in connection with a Federal criminal prosecution if no indictment is returned. No authority exists to reimburse the Federal employee who is charged with an offense and acquitted. Accordingly, the Federal employee must pay for his / her own defense. In the Aberdeen case (*United States v. Dee*), each defendant paid \$105,000.00 in attorney fees.

1007 REMOVAL. A civil or criminal prosecution commenced in a state court against "any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office" may be removed to Federal district court. 28 U.S.C. § 1442(a). Removal must be predicated upon the averment of a Federal defense. *Mesa v. California*, 489 U.S. 121 (1989).

1008 ADDITIONAL READING. For a more detailed discussion of this subject, see Lieutenant Colonel Orval Nangle, USMC, *Marine Corps Officer and Employee Liability For Environmental Noncompliance*, 3 Fed. Facilities Envtl. J. 433 (Winter 1992-93); Commander Larry D. Wynne, JAGC, USN, *A Case for Criminal Enforcement of Federal Environmental Laws*, 38 Naval L. Rev. 105 (1989); Major R. Craig Anderson, USAF, and Major Robert Lee, USAFR, *Private Party Actions Against Federal Officials for Environmental Wrongs*, 31 A.F. L. Rev. 31 (1989); Major John J. Bartus, USAFR, *Federal Employee Personal Liability Under Environmental Law: New Ways for the Federal Employee to Get in Trouble*, 31 A.F. L. Rev. 45 (1989).

APPENDIX A

SUMMARY OF ENVIRONMENTAL CRIMINAL STATUTES

Clean Air Act, 42 U.S.C. § 7401 *et seq.* (CAA)

CAA, as amended by the Clean Air Act Amendments of 1990, is a vast regulatory statute aimed at alleviating air pollution caused by various sources, big and small, as well as preventing the deterioration of air quality in "clean" areas of the country. Criminal provisions, *inter alia*, allow for the prosecution of persons or entities who violate 1) the state implementation plan (SIP), 2) performance and emissions standards, and 3) record keeping, inspection and monitoring requirements.

42 U.S.C. § 7413(c).

Clean Water Act -- see Federal Water Pollution Control Act

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA)

CERCLA addresses the response, notification, cleanup, and liability of past and present releases of hazardous substances into the environment. Failure to notify the National Response Center of a release of a reportable quantity of a hazardous substance and destruction of certain records pertaining to releases are the two significant criminal violations in CERCLA.

42 U.S.C. § 9603.

Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11001 *et seq.* (EPCRA)

EPCRA establishes emergency planning and notification requirements for industry and State and local officials in the event of a chemical release. It also establishes certain chemical inventory reporting requirements for "covered facilities". Criminal violations of EPCRA include the failure to notify the appropriate State and local agencies of a release of a reportable quantity of a hazardous or extremely hazardous

substance. The reporting requirements of EPCRA have been extended to federal agencies by Executive Order (E.O. 12856, Federal compliance with Right-To-Know Laws and Pollution Prevention Requirements (3 August 1993)); however, the criminal provisions are not applicable to federal agencies and their employees.

42 U.S.C. § 11045.

Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA)

ESA provides for identification and listing of plant and animal species in danger of extinction, for protection of individual members of the species from direct harm or interference, and for protection from indirect harm caused by damage to the species' habitat. Major offenses include harming or "taking" an endangered or threatened species.

16 U.S.C. § 1540.

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (FIFRA)

FIFRA regulates the registration and use of pesticides. Major criminal violations include the distribution or sale of unregistered pesticides or the use of the pesticides in manners inconsistent with the labeling.

16 U.S.C. § 136l.

Federal Water Pollution Control Act (Clean Water Act (CWA)), 33 U.S.C. § 1251 *et seq.*

The CWA regulates the discharge of pollutants from point sources into the navigable waters of the United States. "Navigable waters" is defined very broadly and includes wetlands. In addition, the CWA regulates discharges into sanitary sewer systems. The CWA also regulates the placement of dredge or fill materials in navigable waters. Act sets forth criminal sanctions for, inter alia, knowing or negligent discharges into such waters without, or in violation of, permits issued pursuant to the Act.

33 U.S.C. § 1319.

Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.* (MMPA)

MMPA imposes a moratorium on the taking of marine mammals in the absence of a permit. Civil and criminal sanctions are available for violations.

16 U.S.C. 1375.

Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1401 *et seq.* (MPRSA)

MPRSA prohibits the transportation of materials for the purpose of dumping into ocean waters except in compliance with a permit. Knowing violations of MPRSA are misdemeanors, except for the dumping of medical waste, which is a felony.

33 U.S.C. § 1415.

Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.* (MBTA)

MBTA protects migratory birds from any pursuit, killing or possession except as permitted by regulation or permit. The statute applies to any species of bird covered by one of four treaties [Great Britain, Mexico, Japan and Soviet Union (Russia)]. MBTA imposes strict liability scheme, violations are misdemeanors unless committed for commercial purposes. Birds not covered: starling, brown-headed cowbird, English sparrow, and common pigeon.

16 U.S.C. § 707.

Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA)

RCRA regulates the generation, transportation, and treatment, storage, and disposal of solid and hazardous waste. It also has specific provisions relating to used oil and recycling. Criminal offenses include, inter alia, transportation to an unpermitted facility, as well as treatment, storage, or disposal of hazardous waste without a permit, or violation of such a permit.

42 U.S.C. § 6928.

Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407, 411

The Rivers and Harbors Act prohibits the discharge of refuse into navigable waters. Criminal sanctions are imposed based on strict liability. The definition of navigable waters under the Rivers and Harbors Act is not as broad as it is under the CWA.

33 U.S.C. § 411.

Safe Drinking Water Act, 42 U.S.C. § 300(f) *et seq.* (SDWA)

SDWA protects public water supplies and systems, including underground sources of drinking water. It sets forth criminal sanctions for, inter alia, tampering with public water systems, and failing to comply with requirements for underground injection wells.

42 U.S.C. §§ 300h-3 and 300i-1.

Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (TSCA)

TSCA regulates, inter alia, the manufacture, processing, distribution, treatment and disposal of PCBs. It requires testing of new chemical substances and the regulation of substances that pose unreasonable risks of health or environmental injury. Recent amendments cover asbestos and hexavalent chromium and asbestos abatement in school buildings [Title II, known as the Asbestos Hazard Emergency Response Act (AHERA)]. Knowing TSCA and AHERA violations are misdemeanors.

15 U.S.C. § 2615.

APPENDIX B

PROSECUTIONS OF FEDERAL EMPLOYEES FOR ENVIRONMENTAL CRIMES (known cases as of October 6, 1993)

A. STATE PROSECUTIONS

1. *California v. Hernandez*, No. 25148 (Riverside Mun. Ct., May 11, 1992). Mr. Hernandez, the sewage treatment plant foreman at March AFB, pled guilty to falsifying a wastewater test record. He was given a suspended sentence to pay a \$5,000.00 fine and placed on probation for 18 months. In March 1991, without doing any additional tests, Mr. Hernandez had changed sludge test results for biochemical oxygen demand to bring the results within the level authorized by the plant discharge permit.
2. *California v. Lam*, BCR 2738, May 30, 1992. Sam Lam, a civilian employee of the Marine Corps Logistics Base, Barstow, California, was sentenced to pay a \$50,000.00 fine after pleading no contest to five misdemeanor counts each of illegal transport and disposal of hazardous waste, ordered to complete a hazardous materials handling course, and placed on probation for three years. All but \$5,000.00 of the fine was suspended. Mr. Lam was initially charged with sixteen felony counts of illegal transport and disposal in connection with the dumping of ninety 55-gallon drums of sandblast grit contaminated with heavy metals (lead, chromium, cadmium). Mr. Lam did not request removal of the action to federal court. Mr. Lam did request DOJ representation. Initially his request was denied; on reconsideration, DOJ agreed to reimburse Mr. Lam for his legal expenses.

B. FEDERAL PROSECUTIONS

1. *United States v. Kruse*, A-87-CR-115 (W.D. Tex. 1989). This, the first Federal prosecution of Federal employees for environmental offenses, resulted in an acquittal on all charges. Three mid-level management employees of the Bureau of Prisons were charged with conspiracy, disposing of hazardous waste without a permit, transporting hazardous

waste without a manifest, and transporting waste to an unpermitted facility.

2. *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989). On December 16, 1988, Mr. Carr, a maintenance foreman at the Fort Drum firing range in Watertown, New York, was convicted of two counts of failing to report the spill of hazardous substances into the environment under CERCLA. Mr. Carr was sentenced to two 1-year terms of probation to run concurrently and a \$300.00 fine.
3. *United States v. Lewis*, Cr. 3-88-50 (S.D. Oh., Dec 14, 1988). For possession of Americium-241, a radioactive material, in violation of the Atomic Energy Act, 42 U.S.C. § 2273(a), Mr. Lewis, an Army employee, was sentenced to 2 years' confinement (suspended), 2 years of probation and 200 hours of community service.
4. *United States v. Dee, Lentz & Gepp*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991). On May 11, 1989, three senior civilian managers (SES-4, GS-15, GS-14) at the Army's Aberdeen Proving Ground in Maryland were each sentenced to 3 years' probation and 1,000 hours of community service following their convictions on various counts of illegally storing, treating, and disposing of hazardous wastes.
5. *United States v. Bond*, Cr. 91-0287-GT (S.D. Cal. April 9, 1991). Mr. Bond, a civilian employee at the Navy Exchange Auto Repair facility at Naval Base San Diego, California (32nd Street) pled guilty to a misdemeanor violation of the Clean Water Act for illegally pouring radiator fluid contaminated with antifreeze into a storm drain. He was sentenced to 1 year probation and a \$500.00 fine.
6. *United States v. Pond*, Cr. S-90-0420 (D. Md. April 17, 1991). Mr. Pond, a former wastewater treatment plant supervisor at Fort Meade, Maryland, was sentenced to 8 months in prison, a year of supervised release, and restitution of \$99.99 for 1 count of violating the plant's NPDES permit, 8 counts of making false statements on discharge monitoring reports, and 1 count of theft of government property (Mr. Pond worked part-time for a local motel and used government equipment and supplies to test the motel's water samples).
7. *United States v. Ferrin*, 994 F.2d 658 (9th Cir. 1993). On March 24, 1992, Mr. Ferrin, a civilian supervisor at the hazardous waste storage facility at NAVSTA San Diego, California (32nd Street) pled guilty to 1 count of directing subordinates to mix methyl isocyanate, a hazardous waste, with absorbent and dispose of the mixture in an ordinary trash

dumpster behind the facility. Mr. Ferrin was sentenced to 3 years' of supervised probation (including 3 months of home detention) and a \$50.00 penalty. The government appealed the sentence on the ground that the judge had failed to follow the Federal sentencing guidelines. The Court of Appeals agreed and remanded the case to the trial judge for resentencing.

8. *United States v. Curtis*, 988 F.2d 946 (9th Cir. 1993). On May 26, 1992, Mr. Curtis, a GS-12 Fuel Division Officer at NAS Adak, Alaska, was sentenced to 10 months' confinement following his conviction on 3 counts of violating the Clean Water Act by allowing 500,000 gallons of JP5 fuel to spill into U.S. waters. On March 8, 1993, the Court of Appeals affirmed his conviction. Mr. Curtis has now appealed his conviction to the U.S. Supreme Court.
9. *United States v. Woodward* (Unreported decision). Petty Officer Woodward was convicted at special court-martial of falsifying documents and unlawfully disposing of hazardous waste. He was sentenced to 75 days' confinement at hard labor, forfeiture of \$500.00 pay per month for two months, and reduction in rate from E4 to E2.
10. *United States v. Dunn, Larimore & Divinyi*, Cr. No. 92-117-COL (JRE) (M.D. Ga. 1992). In January 1992, three foresters at Fort Benning, Georgia (two GS-12s and one GS-11) were indicted on charges of falsifying documents (timber maps indicating Red-cockaded woodpecker nests) submitted from 1985-1989 for commercial timber harvesting. The case was settled in March 1993, when two of the defendants agreed to pay civil fines of \$1,500.00 and serve 12 months' pretrial probation.

CHAPTER XI

CLEAN AIR ACT (CAA)

1101 REFERENCES

- A. Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*
- B. EPA CAA Regulations, 40 C.F.R. Parts 50-80
- C. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 6
- D. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 6
- E. OPNAVINST 5090.2, Subj: MANAGEMENT OF OZONE DEPLETING SUBSTANCES

1102 PURPOSE. The Clean Air Act (CAA) seeks to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401. Congress created a number of separate programs within the CAA which are discussed below.

A. **Applicability.** The CAA contemplates a system of Federal standards and oversight, delegating primary implementation responsibility to the states. Federal facilities are subject to state and local air pollution regulations under the waiver of sovereign immunity in section 118 which was expanded in 1977 and 1990. Per paragraph 17-5.4.1 of OPNAVINST 5090.1A, Navy vessels shall operate under applicable Federal, state, and local regulations governing air pollution emissions, provided that such compliance does not jeopardize the safety and welfare of the ship or its personnel.

B. **Asbestos and radon.** Though regulated under CAA, asbestos has become such a significant topic it will be treated separately in chapter 20 of this Deskbook. Similarly, radon is a pollutant which may exist in the air; but radon is

regulated under the Toxic Substances Control Act (TSCA). The embryonic radon regulation is discussed in Chapter 19 of this Deskbook.

1103 FEDERAL RESPONSIBILITIES

A. ***Clean air goals.*** EPA sets primary and secondary ambient air quality standards to promote public health and welfare. Primary standards protect human health; secondary standards protect agriculture, property, and aesthetics. The standards, called national ambient air quality standards (NAAQS), are set for "criteria" pollutants of public health concern. 42 U.S.C. § 7409; 40 C.F.R. Part 50.

1. EPA has established NAAQS for the following "criteria" pollutants: carbon monoxide (CO); hydrocarbons (HC); lead (Pb); nitrogen dioxide (NO₂); ozone (O₃); sulphur dioxide (SO₂); and total suspended particulates (TSP).

2. EPA has divided the states into Air Quality Control Regions (AQCRs). 40 C.F.R. Part 81. AQCRs are classified as in "attainment" or "nonattainment," indicating whether they meet the pertinent NAAQS for each criteria pollutant. Nonattainment areas are graded on the degree of severity for several pollutants; the more severe the pollution, the more stringent the regulations. 42 U.S.C. § 7502.

3. In nonattainment areas, EPA may prohibit the construction of new sources or require that they be built with control equipment reducing air pollution to the lowest achievable emission rate (LAER). Facilities in nonattainment areas need to give special attention to the regulatory process.

B. ***National emission standards for hazardous air pollutants (NESHAPs).*** 42 U.S.C. § 7412; 40 C.F.R. Part 61.

1. A "hazardous air pollutant" is a substance, not a criteria pollutant, identified by EPA as a contributor to air pollution which may reasonably be anticipated to result in an increase in mortality, serious irreversible illness, or incapacitating reversible illness.

2. The following substances have been listed: asbestos, benzene, beryllium, coke oven emissions, inorganic arsenic, mercury, radionuclides, and vinyl chloride. Emission standards may include techniques which reduce or eliminate NESHAP emissions, through process changes, collection equipment, modification, work practice, operational standards or combinations thereof.

C. ***State implementation plan oversight.*** The CAA requires states to develop state implementation plans (SIPs) to achieve the NAAQS. 42 U.S.C. § 7410.

EPA requires states to enforce state and Federal pollution control rules. EPA may step in for direct enforcement as necessary when states fail to act.

D. **Control technology.** EPA establishes minimum control technology for categories of new pollutant sources and for hazardous pollutants. 42 U.S.C. §§ 7411, 7412.

1104 STATE RESPONSIBILITIES. EPA sets the NAAQS but the states are responsible for ensuring the standards are achieved. Thus, the principal vehicles for attainment of the NAAQS are the 50 individual SIPs.

A. **SIP management.** Each SIP must be approved by EPA and must contain a mix of controls and strategies sufficient to achieve and maintain the NAAQS. States attempt to achieve the NAAQS by allocating the economic burden of attainment among categories of sources as they deem appropriate. Local enforcement provisions must be available.

B. **Sanctions.** A state's failure to submit a SIP, or obtain approval, or to enforce and implement the SIP can result in Federal sanctions.

1. EPA has two sanctions to pressure states into fulfilling their responsibilities: (1) cutting Federal funding for highway or sewage treatment projects; and (2) drastically increasing the amount of emission reductions needed to offset new source emissions.

2. EPA must impose at least one sanction whenever a state has not corrected its failure within 18 months after EPA identifies the problem. If the state has yet to correct the failure six months later, both sanctions apply. EPA must impose both sanctions if the state shows a "lack of good faith" in making corrections.

C. **Federal implementation plans.** If the SIP fails to produce results or appears likely to fail, EPA must step in and take corrective action when states do not do their part by issuing a Federal implementation plan (FIP).

D. **State powers.** While states must enforce Federal requirements, they are free to develop more stringent pollution controls where necessary or locally desirable. For example, states may require an air pollution permit for each source, even though there is no such requirement in Federal law.

E. **Organization.** Some states (e.g., California) are organized into Air Quality Management Districts, each of which may design its own regulatory scheme to meet local air quality needs. Judge advocates must be familiar with these

requirements because activity that is perfectly legal in one district may be contrary to regulations in another.

1105 DUAL REGULATORY SCHEMES. The content of the SIP will vary depending on whether or not the area is in attainment. Regardless of which set of rules applies, state permitting requirements may exist outside of any EPA-approved SIP for the attainment or nonattainment areas.

A. **Clean air.** Areas which are in attainment are regulated under the Prevention of Significant Deterioration (PSD) program. PSD also applies in geographic regions for which there is insufficient data to determine whether the NAAQS has been achieved. The stringency of the PSD regulation varies with the importance of maintaining air quality in the area. 42 U.S.C. §§ 7470-7479.

B. **Dirty air.** By contrast, "nonattainment" rules apply where the primary or secondary NAAQS have not been achieved. The consequences include more stringent permitting and control requirements for new and modified sources of pollution. 42 U.S.C. §§ 7501-7515.

1106 STATIONARY SOURCES. Stationary sources are regulated through AQCR permits. Generally, permits are required for "major sources" and "new sources." Permits must consolidate all limitations on the source, including air toxics. In appropriate cases, EPA can void an AQCR permit, then issue and administer its own permit. Permits are also needed for sources regulated under PSD, new source performance standards (NSPS), acid rain, and air toxics programs. The AQCR must collect fees to cover permit program costs. 42 U.S.C. §§ 7661-7661(f).

A. **Major sources.** The definition of "major sources" varies with the criteria pollutant it creates and the nonattainment category into which the area falls. Typically, the standard is 100 tons per year. Lower standards exist to focus on special problems. In extreme ozone nonattainment areas, the threshold is 10 tons per year. The standard is 70 tons per year in serious PM-10 nonattainment areas. (PM-10 refers to particulate matter which is more than 10 microns in diameter, about one-tenth the width of a human hair.)

B. **New sources.** In addition to the obvious meaning, "new" sources include new equipment and modifications. New sources need permits to be built and operated. They are subject to NSPS and technical standards for specific categories of industrial sources called "best available control technology" (BACT) to achieve the "lowest achievable emission rate" (LAER).

C. **Emissions trading, offsets, and "bubbles."** Given that it is more cost-effective to further restrict older, more inefficient polluting sources rather than new ones, the CAA permits some flexibility for stationary sources. For example, offsets earned for shutting down an emission source can be saved or sold—at a prescribed discount—to insure a net decrease in emissions. "Bubbling" can be particularly useful. Normally, each smokestack, or motor pool, is a separate "source." With the bubbling concept, the whole installation can be treated as one source. Consequently, increases at one plant may be offset by decreases at another. Bubbling can be used to bypass special Federal rules pertaining to major new or modified sources, and it may be recognized by state law. Bubbling enables operators to spend their emissions control money most effectively.

1107 MOBILE SOURCES. Mobile sources are regulated primarily on a national level. Since military aircraft are not yet subject to regulation, the primary concern in DOD is cars and trucks. Despite statutory restrictions, the increasing number of motor vehicles on the road has offset much of the emission reductions gained. Mobile sources still account for about half of the ozone "precursors" and most of the carbon monoxide. To deal with the growing problem, Congress enacted a number of staged programs in the 1990 amendments to attack these emissions from several angles. 42 U.S.C. §§ 7521-7590; 40 C.F.R. Part 86.

A. **Emissions standards.** Tighter pollution standards for emissions from automobiles and trucks will reduce harmful tailpipe emissions on a phased-in basis beginning in model year 1994. Automobile manufacturers will also be required to reduce vehicle emissions resulting from the evaporation of gasoline during refueling. The stricter standards employed in regulating automobile emissions in California can be adopted by other states as well.

B. **Inspection and maintenance of pollution controls.** Per paragraph 6-5.4.2 of OPNAVINST 5090.1 and paragraph 6512 of MCO P5090.2, Navy and Marine Corps commands shall comply with vehicle emission inspection and maintenance (I/M) requirements in all areas where states or their subdivisions have adopted such regulations. Commands are authorized to develop I/M procedures for their fleet vehicles as a part of normal preventive maintenance programs. In addition, section 118(d) of the CAA (42 U.S.C. § 7418) requires that vehicles operating on Federal installations comply with the I/M program of the state in which the installation is located, regardless of where the vehicle is registered.

C. **Traffic management.** Transportation control measures are required under the CAA for severe and extreme ozone nonattainment areas. Many California air districts have adopted Transportation Demand Management regulations to reduce the number of single-occupant vehicles on the highways. These regulations generally impose requirements on employers, including military base commanders.

D. **Fuels.** Fuel quality will also be controlled as the regulations under the 1990 amendments take shape. Scheduled limits will be implemented to reduce gasoline volatility and sulfur content and some areas will be required to use cleaner, "reformulated" gasoline beginning in 1995. See 59 Fed. Reg. 7716, February 16, 1994 (to be codified at 40 C.F.R. § 80). Further, 26 of the dirtiest areas of the country will have to adopt programs limiting emissions from centrally fueled fleets of 10 or more vehicles beginning as early as 1998.

E. **Navy vessels.** Per paragraph 17-5.4.2 of OPNAVINST 5090.1A, the following operating procedures shall be followed by ships.

1. Navy ships at pierside shall implement operation and maintenance procedures to prevent stack emissions in violation of state and local regulations. Specifically, Navy ships shall comply with the regulations on the opacity of smoke during normal operation of boilers and special periods, such as lighting off, securing, baking out, or testing of boilers.

2. In port, Navy ships shall minimize operation of boilers and diesel engines by using shore-provided "hotel" services whenever operational requirements permit. Blowing of boiler tubes in port shall be limited to the minimum necessary to conform with provisions of Chapter 221 of the *Navy Ships Technical Manual* (NSTM).

3. Navy vessels operating in the territorial sea (out to 12 nm) of foreign countries shall abide by air emission standards defined in the Status of Forces Agreement (SOFA) or international agreement. If no SOFA or international agreement exists, vessels shall operate consistent with the substantive air emission standards observed by the host country's military forces until a satisfactory agreement on the subject can be effected. Unless otherwise provided in a SOFA or international agreement, Navy vessels operating temporarily within a foreign jurisdiction are subject to that country's standards to the extent specified by the clearance for visit.

1108 VOLATILE ORGANIC COMPOUNDS (VOCs). One area of regulation that has been of particular concern for the Navy is the limitation on the formulation and application of paints and coatings to reduce solvent emissions, called VOCs. These substances, which play a role in the creation of ozone, are targeted for reduction and elimination in aircraft coatings, architectural, marine, and vehicle coatings. Other sources of VOCs include: fuel transfer operations; refueling operations; maintenance activities using solvents; evaporation ponds; drycleaning plants; and painting work.

A. **Regulatory approach.** Some regulations limit formulations, others limit application techniques to reduce air release. EPA and the local agencies are interested in emission controls, "scrubbers" and filters, which can be very expensive when used in large operating areas.

B. **Navy compliance.** Only approved solvents, paints, fuels, lubricants, and chemicals shall be used aboard ship. A list of materials prohibited on ships is included in NSTM, chapter 670. The Navy has been able to obtain compliance schedules and variances from local rules upon a showing that our needs are unique, or that complying coatings are not commercially available. Substitutions of coatings must be approved by responsible procurement authorities. Naval Facilities Engineering Command (NAVFACENGCOM) environmental engineers are an excellent source of first-line information in these technical matters, and may have an ongoing working relationship with certain local agencies.

1109 ACID RAIN. Acid rain occurs when sulfur dioxide (SO₂) and nitrogen oxide emissions are transformed in the atmosphere and return to the earth in rain, fog, or snow. Acid rain damages lakes, harms forests and buildings, contributes to reduced visibility, and is suspected of damaging health. Since the pollutants which contribute to acid rain are emitted mostly from the burning of fossil fuels by electric utilities, this issue has limited significance to DOD. 42 U.S.C. §§ 7651-7651(o).

A. **Phased program.** The 1990 amendments created a two-phase program, beginning in 1995 and 2000, to achieve permanent sulphur dioxide emission reductions. Phase I affects 110 major power plants in areas with significant problems to reduce their emissions at a rate tied to their energy output and fuel use between 1985 and 1987. Phase II will apply to a larger number of plants and require emission reductions at a rate more than twice as stringent as that applicable during Phase I.

B. **Compliance incentives.** Special incentives are provided to encourage use of certain control technologies. Reductions below statutory limits create credits which can be sold to other utilities for their use in meeting the prescribed limits. Violators will be required to pay a \$2,000.00 per ton excess emissions fee and offset the excess the following year.

1110 STRATOSPHERIC OZONE PROTECTION. Title VI of the CAA reflects congressional concern for stratospheric ozone and "greenhouse effect." To reduce the harmful effects of chemicals that deplete the ozone layer, EPA has promulgated regulations to implement a progressively more stringent program to eliminate production of certain classes of chemicals, including chlorofluorocarbons (CFCs), halons, carbon tetrachloride, and methyl chloroform. See 58 Fed. Reg. 69,638 and 58 Fed. Reg. 69,672, December 30, 1993 (to be codified at 40 C.F.R. § 82). EPA

must publicize safe substitutes and ban unsafe substitutes. As these regulations continue to develop, consult DOD Directive 6050.9 of 13 February 1989, Subj: CHLOROFLUOROCARBONS (CFCs) AND HALONS, SECNAVINST 5090.5, Subj: MANAGEMENT AND ELIMINATION OF OZONE DEPLETING SUBSTANCES, OPNAVINST 5090.2, and MCO P5090.2, regarding policies and responsibilities for elimination of ozone-depleting substances. 42 U.S.C. §§ 7671-7671(q).

1111 TOXIC AIR POLLUTION

A. **Background.** Toxic air pollutants are those pollutants which are hazardous to human health or the environment, but are not specifically covered under another CAA section. These pollutants are typically carcinogens, mutagens, and reproductive toxins. Over the history of the air toxics program, only seven pollutants have been regulated. The typical reason cited for the failure of the CAA in this area is the statutory burden on EPA to make findings regarding the health effects of a particular toxic air pollutant before the agency can regulate. EPA made these findings using risk assessment, a process that estimates the risks to human health posed by exposure to toxic air pollution. Risk assessments result in highly inexact and uncertain findings which are vulnerable to judicial challenge, severely slowing EPA's progress. 42 U.S.C. § 7412.

B. **Technology-based approach.** Title III of the 1990 amendments replaced the ineffective risk-assessment approach with a technology-based approach which should significantly enhance EPA's ability to address our nation's toxic air pollution problem. The CAA now contains a list of 189 hazardous air pollutants. Pursuant to the CAA, EPA has published a list of source categories (industries) that emit one or more of the listed pollutants. See 57 Fed. Reg. 31,576 (July 20, 1992). This list contained both major sources and area sources. Major sources are stationary sources which emit more than 10 tons of any one pollutant or 25 tons of a combination of pollutants. Area sources are all other stationary sources of air toxics. Source categories will be regulated in order of their potential risk to public health and the efficiency of grouping sources. EPA will require sources of toxic air pollution to apply the Maximum Achievable Control Technology (MACT). A regulatory schedule for 174 source categories was published at 58 Fed. Reg. 63,941 (December 3, 1993).

1112 PERMITS. The 1990 amendments introduced a permit program modeled after the National Pollution Elimination Discharge System (NPDES) under the Clean Water Act (CWA). The program enhances EPA's ability to enforce the CAA by requiring every major air pollution source to have an operating permit that outlines its compliance requirements.

A. **Program development.** EPA issued program regulations on 21 July 1992. See 57 Fed. Reg. 32,250 (to be codified at 40 C.F.R. § 70). Each state was required to submit a permit program meeting these regulatory requirements to EPA by 15 November 1993. EPA has one year to accept or reject the state proposal. The amendments require EPA to levy sanctions against a state that does not submit or enforce a permit program.

B. **Permit applications.** All sources subject to the permit program must submit a complete permit application within 12 months of the effective date of the program. The state permitting authority has 18 months to determine whether an application should be approved. Each permit issued to a facility will be for a fixed term of up to five years. The state collects a fee from the permitted facility to defray reasonable direct and indirect costs of the permitting program. This fee will eventually be at least \$25.00 per ton.

C. **Public participation.** All permit proceedings—including initial issuance, significant modifications, and renewals—must provide for public notice, including an opportunity for comment and a hearing.

D. **EPA "veto."** EPA has 45 days to review each permit and to object to permits that violate the CAA. If EPA fails to object, any person may petition EPA to object within the 60 days following EPA's 45-day review period. EPA must grant or deny the permit within 60 days. Petitioners can seek review of EPA's decision in the United States Court of Appeals.

E. **Variances.** Variances can be granted if a source cannot comply with a permit, but other compelling interests justify deferral of enforcement while the source works to achieve compliance. EPA can issue compliance orders with one-year compliance schedules. Per paragraph 6-5.2.1 of OPNAVINST 5090.1A and paragraph 6502 of MCO P5090.2, each Navy and Marine Corps stationary source unable to achieve timely compliance with applicable emission limitations shall request a variance or other administrative relief from the appropriate regulatory agency to continue operating until compliance can be achieved. Contact the Naval Facilities Engineering Command (NAVFACENGCOM) Engineering Field Division (EFD) for assistance if needed.

E. **Certification.** In addition, sources must certify their compliance. EPA has authority to issue administrative subpoenas for compliance data.

1113 ENFORCEMENT. In addition to the powers regarding permits, the CAA contains a panoply of enforcement mechanisms to ensure the congressional intent is achieved.

A. **Administrative penalties.** EPA may issue administrative penalty orders up to \$200,000.00. Inspectors can issue field citations up to \$5000.00 for lesser infractions. States operating their own clean air program pursuant to a delegation of authority from EPA have similar administrative penalty authority. After *U.S. Dept. of Energy v. Ohio*, 112 S.Ct. 1627 (1992), however, it is no longer clear that sovereign immunity has been waived sufficiently to subject Federal Government activities to state administrative penalties. The *Dept. of Energy* case involved Resource Conservation and Recovery Act (RCRA) and CWA violations, but the principle reiterated in that case was that a waiver of sovereign immunity must be clear and unambiguous to be effective. Because section 118 of the CAA (42 U.S.C. § 7418) does not explicitly state that Federal facilities are subject to payment of state administrative penalties, there is no clear and unambiguous waiver of sovereign immunity. On the other hand, the United States is subject to citizen suits for CAA violations (*infra*), and citizen suit remedies may include payment of penalties. Consequently, any Navy activity receiving an administrative penalty assessment should forward it to the Office of Assistant General Counsel (Installations and Environment) (OAGC(I&E)) via their Regional Environmental Coordinator and their chain of command for a determination as to whether the assessment is payable. 42 U.S.C. § 7413(d).

B. **Judicial penalties.** Both civil and criminal sanctions under the CAA can be quite severe. Civil penalties up to \$25,000.00 per day are authorized. Criminal penalties for knowing violations are felonies, carrying penalties that range from 2 years (false statement offenses) to 15 years (knowing endangerment offenses) with concomitant fines. 42 U.S.C. § 7413(c).

C. **Citizen suits.** Section 304 of the CAA (42 U.S.C. § 7604) provides that any person may commence a civil action against any violator, including Federal agencies. Plaintiffs must give 60 days' notice. Citizens may seek penalties against violators; the money collected from these penalties will be deposited in a U.S. Treasury fund to defray the cost of EPA's compliance and enforcement activities.

1114 CONFORMITY. Section 176(c) of the CAA (42 U.S.C. § 7506) requires all Federal agencies to determine that any agency or agency-supported activity conforms with an approved or promulgated SIP or FIP. The Federal agency must make the conformity determination, but may adopt the analysis of another agency. If a proposed Federal activity does not or cannot be made to conform, the Federal agency cannot approve or permit the activity to proceed. The EPA regulation implementing this section was promulgated on 30 November 1993. See 58 Fed. Reg. 63,214 (1993) (to be codified at 40 C.F.R. § 51.850).

A. ***When the rule applies.*** At present, the conformity rule applies to nonattainment areas and attainment areas that are subject to maintenance plans.

1. An agency must make a conformity determination when the total emissions from ***all*** sources (including mobile sources) either exceed de minimis emissions levels specified in 40 C.F.R. § 51.853, or equal to 10% or more of an area's total emissions for that pollutant.

2. EPA intends to issue a supplemental notice of proposed rulemaking dealing with conformity requirements only in portions of attainment areas that have exceeded 85% of the NAAQS. Until EPA promulgates such a rule, however, a conformity determination is not required for Federal projects in attainment areas below 85% of the NAAQS.

B. ***What is conformity?*** Conformity means compliance with an implementation plan's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards.

1. Specifically, conformity means ensuring a Federal activity will not: (1) cause or contribute to any new violation of any standard in any area; (2) increase the frequency or severity of any existing violation of any standard in any area; or (3) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

2. To conform, an action must meet both air quality criteria and emissions-related criteria set out in 40 C.F.R. § 51.853.

3. An agency must base its conformity determination on the most recent estimates of emissions. In making its determination, an agency must base its emissions estimates on the most recent population, employment, travel, and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

C. ***Types of emissions.*** Emissions from both mobile and stationary sources are subject to conformity requirements. Also, Federal agencies must consider the total direct and indirect emissions of criteria pollutants or their precursors.

1. Direct emissions are those emissions of a criteria pollutant or its precursors that a Federal action causes or initiates and which occur at the same time and place as the action.

2. Indirect emissions are those emissions of a criteria pollutant or its precursors that a Federal action causes, but may occur later in time and / or may be farther removed in distance from the action itself. The emissions must still be

reasonably foreseeable and the Federal agency must have and will continue to maintain some authority to control the emissions.

D. ***Applicability: actions falling outside the rule.*** Under 40 C.F.R. § 51.853(c)(1), if the total direct and indirect emissions from a Federal action, after subtracting any exempted emissions or emissions that are presumed to conform, do not exceed the thresholds for criteria pollutants, the action is deemed de minimis and is exempt from the conformity requirements. An agency does not have to document a de minimis determination.

1. 40 C.F.R. § 51.853(c) through (e) lists actions that are exempt from conformity determinations.

2. Some actions are exempt if they result in de minimis or no net increase in emissions. Examples of this type of exemption include, among others: continuing and recurring activities; routine maintenance and repair activities; routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and / or for repair or overhaul; and interagency transfers of property.

3. Other actions are exempt regardless of the amount of emissions produced. Examples of this type of exemption include, among others: activities (or portions of activities) that require a permit under new source review (NSR) or prevention of significant deterioration (PSD) programs; emergency actions; alterations and additions of existing structures specifically required by applicable environmental legislation or regulations (e.g., hush houses for aircraft engines); and, remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

4. In determining whether an action results in emissions below the de minimis thresholds, the Federal agency can "carve out" exempted emissions and then compare the remaining emissions against the de minimis levels.

E. ***Mitigation.*** If an action does not initially conform with the applicable SIP, then an agency may pursue a plan for mitigation or emission offsets.

1. The conformity determination must identify and describe any measures designed to mitigate air quality impacts.

2. After a state revises its SIP to adopt its general conformity rules and EPA approves that SIP revision, both the state and Federal governments may enforce any agreements, including mitigation measures, necessary for a conformity determination.

F. **Reporting requirements.** A Federal agency must provide a 30-day notice to EPA, state and local air quality agencies, metropolitan planning organization, and affected Federal land manager of draft conformity determinations. State and local air agencies do not have a concurrence role in the conformity analysis. Within 30 days after completing a final conformity determination, a Federal agency must notify the same agencies.

G. **Public participation.** Upon request, a Federal agency must make available for review its draft determination with supporting materials describing analytical methods and conclusions.

1. After a Federal agency makes a draft conformity determination, the agency must publish a notice of availability. The notice must be prominently advertised in a daily newspaper of general circulation in the area affected by the action.

2. The agency must allow the public 30 days to provide written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the National Environmental Policy Act (NEPA) process.

3. The agency must document its response to all comments received on its draft conformity determination. Within 30 days of the final determination, the agency must make the comments and responses available upon request.

4. After making a final conformity determination, the agency must publish a notice of availability. The notice must be prominently advertised in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination. After making the final conformity determination, the agency does not have to wait 30 days for public review or comment prior to proceeding with the action.

CHAPTER XII

THE CLEAN WATER ACT (CWA)

1201 REFERENCES

- A. Federal Water Pollution Control Act (a/k/a Clean Water Act (CWA)), as amended, 33 U.S.C. §§ 1251 *et seq.*
- B. EPA CWA Regulations, 40 C.F.R. Parts 100-140, 400-700
- C. Federal Facilities' Compliance under CWA, 33 U.S.C. § 1362
- D. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCE PROGRAM MANUAL, Ch. 7
- E. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 12

1202 OVERVIEW. The primary objective of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The CWA regulates the discharge of pollutants into the navigable waters of the United States in several different ways. For example, direct discharges of pollutants by point source dischargers are restricted through the National Pollutant Discharge and Elimination System (NPDES) permit program. In order to understand the CWA, several important terms must first be defined:

A. **Pollution.** "Pollution" is defined as any "man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water." 33 U.S.C. § 1362(19)

B. **Pollutant.** A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, and sand, cellar dirt and industrial, municipal, and agricultural wastes discharged into water." Sewage from vessels is specifically excluded from this definition. 33 U.S.C. § 1362(6).

C. **Navigable waters.** "Navigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). This definition has been interpreted to include any body of water or water course which could remotely affect interstate commerce. All waters which are, ever were, or could be used for interstate commerce, plus all tributaries thereof, all adjacent wetlands, and any waters that could provide a product (such as fish or shellfish) or a use (such as recreation) which could affect interstate commerce. Groundwater is not included, although there is some case law holding that discharges of pollutants that make their way into "navigable waters" through soil and ground water are within the regulatory purview of the CWA. See *Sierra Club v. Colorado Refining Co.*, No. 93-K-1713 (D. Colo. Dec. 8, 1993).

D. **Point sources.** A "point source" is "any discernable, confined, and discrete conveyance, including—but not limited to—any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or maybe discharged." 33 U.S.C. § 1362(14).

E. **Federal compliance.** Under 33 U.S.C. § 313, Federal facilities are subject to "Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity. . . ."

1203 NPDES PERMIT PROGRAM. In order to legally discharge pollutants into surface waters, all point source dischargers must have an NPDES permit. Usually, one NPDES permit is issued to cover all point sources for a base. Permits must incorporate effluent limitations stringent enough to meet the national minimum levels of pollution control technology set by EPA and any applicable state water quality control standards. Permits typically include other requirements relating to effluent monitoring, calibration and maintenance of equipment, reporting, and record keeping.

A. **Pollution control technology.** Federal law specifies a minimum level of pollution control technology that must be employed by each point source. Point sources are grouped by industry or subgroup of industry for purposes of identifying technological requirements. If a source does not fit into any existing industrial category, then the EPA (or a state with a qualified NPDES permit program) uses its "best professional judgment" in establishing a control technology requirement. For a variety of regulatory purposes, there are two types of point sources: publicly owned treatment works (POTWs), i.e. sewage treatment plants, and all others. As a policy matter, the EPA has ruled that Federal sewage treatment facilities are *not* treated as POTWs, even if they treat only domestic sewage. Consequently, an extensive

discussion of POTW regulation will be omitted in this chapter. Under Navy policy, however, discharges to Federal sewage treatment facilities are subject to the pretreatment standards because meeting such standards affects the ability to dispose of the sludge on land (see discussion of federally owned treatment works (FOTWs) under Chapter 15 on Resource Conservation and Recovery Act.

EPA does not mandate specific control equipment; rather, EPA specifies maximum levels of permissible pollution based on the performance of equipment that it identifies as meeting the appropriate technological requirement. The technological requirements vary, reflecting the different balances between risk of harm, technological feasibility, and cost-benefit considerations, for each category of pollutants. Pollution control is required even if the receiving water already meets applicable water quality standards. Control technology is an evolving variable in water pollution regulation. As better technology is developed, it will have to be employed. States may impose tighter effluent restrictions through the use of water quality standards discussed later in this chapter.

1. **Conventional pollutants.** Conventional pollutants include biochemical oxygen demand (BOD), suspended solids, fecal coliform, pH level (i.e. acidity / alkalinity balance), grease and oil. 40 C.F.R. § 401.16. Effluent limits for conventional pollutants are set to reflect the performance of the "best conventional pollutant control technology" (BCT). 33 U.S.C. § 1311(b)(2)(E). In order to determine the BCT standard to apply to a given industry, EPA is required to weigh the cost of effluent reduction against the benefit received. 33 U.S.C. § 1314(b)(4)(B).

2. **Toxic and nonconventional pollutants.** Toxic pollutants subject to this standard are listed at 40 C.F.R. § 401.15 and include benzene, DDT and other pesticides, heavy metals (lead and mercury), trichloroethylene (TCE), and polychlorinated biphenyls (PCBs). Effluent limits are set to reflect the performance of the "best available technology economically achievable" (BAT). 33 U.S.C. § 1311(b)(2)(A). BAT represents the very best control and treatment measures that have been or are currently capable of being achieved.

3. **New sources and pretreatment requirements.** Like the Clean Air Act (CAA), new sources are generally subject to more stringent control technology than existing sources. The CWA requires the establishment of new source performance standards (NSPS) for all new point source dischargers. Effluent limits for this category are set to reflect the performance of the "best available demonstrated control technology, processes, operating methods or other alternatives including, where practicable, a standard permitting no discharge of pollutants." 33 U.S.C. § 1316(a)(1).

B. Technology variances and modifications. Under certain circumstances, dischargers of pollutants can obtain a variance or modification of the control technology that would otherwise be required.

1. **Section 301(c) modifications.** BAT requirements may be modified if a lower level of control "(1) will represent the maximum use of technology within the economic capability of the owner or operator and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. § 1311(c).

2. **Section 301(g) modifications.** BAT requirements can be reduced for ammonia, chlorine, color, iron, and total phenols. This modification is applicable only if a lower level of control presents no unacceptable impacts on water quality, human health, or the environment. The variance cannot result in a requirement lower than "best practicable control technology currently available" (BPT). 33 U.S.C. § 1311(g).

3. **Section 301(n) modifications.** EPA's model control technology may be inappropriate, for example, where a given point source may use a process different from that normally employed in its industry. In such cases, the source can request an alternative requirement tailored to its process, given the "fundamentally different factors." Modification of BPT, BCT, and BAT requirements may be approved if:

a. The alternative requirement is no less stringent than justified by the fundamental difference; and

b. the alternative requirement will not result in nonwater quality environmental impacts markedly more adverse than those considered by EPA in developing the national effluent limitation for the industry group. 33 U.S.C. § 1311(n).

4. **Credits.** When pollutants are present in the intake water, the discharger may receive a "credit" for those pollutants. The discharger must show that, in the absence of those pollutants, a properly installed and operated control system would meet effluent limitations. Credit is granted only to the extent necessary to meet the applicable limitation. 40 C.F.R. § 122.45(g).

5. **Thermal discharges.** If a discharger can show that a thermal discharge will not affect the "propagation of a balanced, indigenous community of shellfish, fish, or wildlife in or on the body of water," a discharger can receive a variance from the normal limits for thermal pollution. See 40 C.F.R. § 125.70-73.

C. **Negotiating permits.** The regulators' proposed permit requirements *are* routinely negotiable. Recognizing that the regulator occupies the superior position, DON representatives cooperate with Federal, state, and local officials to make the most of the bargaining room that exists. Unreasonable negotiating positions can result in undesirable requirements.

1. If a state or local agency is the permitting authority, review the state / local laws on permit issuance for limitations on agency authority. Many state laws prohibit the imposition of requirements more stringent than Federal requirements. DON representatives should ensure that the state agency follows its provisions regarding administrative due process in developing the prospective requirements. To counter possible discrimination against Federal facilities, review permit conditions imposed on other similar commercial facilities. Federal facilities need only comply to the same extent as other regulated entities.

2. Consider the grounds for modifications and variances. For requirements based on water quality standards (discussed later in this chapter), consider: the size of the "mixing zone"; the existence of natural pollution of the type to be controlled; and state rules that may allow exemptions "in the public interest," etc. Above all, make sure that the facility can function properly and carry out its mission with the permit it receives.

3. Permits are valid for a maximum period of five (5) years. Submission of a timely renewal application automatically extends the existing permit.

1204 WATER QUALITY STANDARDS. States establish water quality standards based on desired uses (e.g., recreation, public water supply, or industrial uses) of the particular water area. Protected waters can include those not within the definition of "waters of the United States," including ground water. 33 U.S.C. § 1313.

A. Before EPA may issue a Federal NPDES permit, the affected state must certify that the permit would not violate state-established water quality standards. This enables the state to impose more stringent local requirements and effectively gives the state a veto over Federal permits.

B. After states have identified a specified use for a body of water, the aggregate of pollution discharges (total maximum daily load) must be limited to ensure that the specified use can be achieved. Some states create narrative standards (e.g., "State waters shall be free of oil, scum, and floating debris in amounts that are unsightly or harmful"). Other states impose quantitative standards (e.g., "State waters shall contain not less than 5 parts per million of dissolved oxygen").

1205 PRETREATMENT STANDARDS. The NPDES permitting program applies only to facilities that discharge directly into surface waters (e.g., lakes, rivers, wetlands, or oceans). Facilities that discharge into a sewerage system that leads to a POTW, rather than directly into a surface water, are regulated under the CWA industrial pretreatment program. This program requires that controls be placed on the discharge of pollutants to POTWs as necessary: (1) to prevent pollutants from interfering with the functioning of the POTW; (2) to prevent those pollutants from causing the POTW to violate its NPDES permit; and (3) to assure compliance with the POTW's sludge use or disposal practices. 33 U.S.C. § 1317.

A. Generally, municipalities that operate POTWs with a daily flow of more than 5 million gallons are required to operate an industrial pretreatment program. This program is incorporated in the municipality's NPDES permit and is enforceable under the CWA. EPA or approved states implement the industrial pretreatment program at smaller POTWs. To implement the program, significant industrial users must be issued permits or orders regulating their discharges. These permits or orders, similar to NPDES permits, set out limitations on pollutants and other requirements which must be met in order to comply with the CWA.

B. General pretreatment standards prohibit against discharges that pass through or interfere with a POTW. There are general prohibitions against fire or explosive hazards, corrosivity, solid or viscous obstructions, "slug" discharges, and heat sufficient to inhibit biological activity at a POTW. 40 C.F.R. § 403.5(a) and (b).

C. Categorical pretreatment standards are primarily directed to control toxic pollutants in specific industries. The standards are expressed as concentration limits or mass weight per unit of production. A source must be in compliance no later than three (3) years after the promulgation of the standards. 40 C.F.R. §§ 405-471.

D. Dischargers to FOTWs must meet any pretreatment standards that have been established for POTWs if the FOTW intends to avoid classifying its sludge as hazardous waste. This issue is discussed in Chapter 15.

1206 NONPOINT SOURCE WATER POLLUTION. Nonpoint source water pollution is the introduction of toxic, nonconventional, and conventional pollutants into surface waters from any source other than a point source as defined previously in this chapter. Nonpoint source water pollution includes runoff from construction sites, streets, parking lots, agricultural and forestry activities. Despite the imposition of technological controls on point source dischargers and the enforcement state water quality standards through NPDES permits, much of the nation's surface waters still are not suitable for use as public water supplies or even for recreation.

A. ***Nonpoint source management programs.*** In order to address this problem, the CWA encourages the states to develop management plans to deal with nonpoint source water pollution. 33 U.S.C. § 1329. Under the management plan, states must identify water bodies that are impaired due to nonpoint sources of pollution. The states have a responsibility to develop a management program which includes:

1. An identification of the best management practices (BMPs) and measures to reduce pollutants from each category and subcategory of nonpoint source of water pollution, including impact on ground water quality;
2. an identification of programs (regulatory programs for enforcement, technical assistance, education, and training) to implement the BMPs for each category and subcategory;
3. a schedule for implementation of the BMPs; and
4. a certification by the state attorney general that the state has the legal authority to implement the plan.

B. ***Storm water discharge permits.*** Storm water is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(a)(13). Certain municipal sewer system and storm water discharges from industrial activities, including construction sites, are required to obtain Federal / state NPDES permits for regulation of this type of discharge. 40 C.F.R. § 122.26(a)(14) establishes the permitting requirements for storm water discharges associated with industrial activity. Any industrial facility which handles raw materials in bulk, outside, exposed to the elements will fall within this definition. Also, EPA is in the process of developing a multi-sector industrial storm water permit which will establish specific requirements for storm water control at different types of industrial activities. Facilities owned by the Federal Government are specifically included within the regulations. Many states have storm water permitting authority.

1207 THE STATE NPDES PERMIT PROGRAM. In order to control the NPDES permit process for waters within the jurisdiction of a state, the governor must submit a "full and complete description of the program it proposes to establish" to EPA. 33 U.S.C. § 1342. EPA will evaluate the state's application to ensure that the state has the statutory authority and resources to administer the program in the same manner as the Federal permit program. In the same manner as EPA-issued NPDES permits, any permit issued under the state program must incorporate established technological control standards, water quality standards, and pretreatment standards. The permits should include requirements for monitoring

effluent discharges, record keeping, equipment maintenance and calibration, and periodic reporting requirements. Unless expressly stated (e.g., Marine Sanitation Device (MSD) regulation and shipboard discharges), the CWA does not preempt state regulation or pollution abatement. States may impose more stringent effluent standards than those required by EPA.

1208 ENFORCEMENT

A. **Reporting.** One of the most important provision in a CWA permit is the self-reporting requirement which imposes a duty on the discharger to submit discharge monitoring reports (DMRs) to the regulatory agency at regular intervals. DMRs must be certified under oath as accurate records of the type and quantity of effluent discharged during the reporting period. Inaccurate DMRs or failure to file them can result in civil and criminal penalties. Pollution control problems, such as the accidental discharge of raw sewage due to equipment malfunction, must also be reported. DMRs can be obtained from Federal facilities through the Freedom of Information Act. Environmental groups can use these reports to form the basis for civil action against a Federal facility.

B. **Site inspections.** EPA and authorized state and local inspectors may enter military facilities to inspect equipment, sample effluent, and inspect records. In order to receive access to classified areas, personnel must meet the requirements of OPNAVINST 5510.1, Subj: DON INFORMATION AND PERSONNEL SECURITY PROGRAM REGULATION. EPA has an internal program for granting necessary security clearances. Any problems associated with obtaining security clearances for EPA, state, or local inspectors should be referred to CNO (N-45), Environmental Protection and Occupational Safety and Health Division.

C. **Administrative orders.** Under 33 U.S.C. § 1319(a), the provisions of the CWA may be enforced by the administrative orders of the EPA or state agencies. Violators are subject to administrative penalties under section 1319(g). Violation of Class I civil penalties carry penalties of \$10,000.00 per violation up to a maximum amount of \$25,000.00. Class II civil penalties are increased to \$10,000.00 per day for each day the violation continues to a maximum amount of \$125,000.00.

D. **Judicial enforcement**

1. **Civil enforcement.** Per 33 U.S.C. § 1323(a), the United States is liable only for civil penalties "arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." Generally, CWA civil monetary penalties may not be assessed against Federal agencies or personnel.

2. **Criminal enforcement.** Per 33 U.S.C. § 1319(c), negligent violations carry a maximum fine of \$25,000.00 per day and one year in prison. Knowing violations carry a maximum punishment of a \$50,000.00 fine and three years' imprisonment for each violation in the first conviction; \$100,000.00 fine and six years' imprisonment for subsequent convictions. The CWA's "knowing endangerment" provision carries a maximum punishment of a \$250,000.00 fine and 15 years' imprisonment for any person who knowingly violates the CWA and who "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." 33 U.S.C. § 1319(c)(3)(A).

3. **Injunctions.** Regardless of whether civil or criminal penalties are available as enforcement tools, the greatest threat to a Federal activity may be an injunction. Compliance with an injunction prohibiting a specific discharge may only be possible through cessation of the process (industrial or otherwise) which generates the offending pollutant. An injunction possess the power to bring Federal activities to an immediate halt.

4. **Citizen suits.** Under 33 U.S.C. § 1365, any citizen "having an interest which is or may be affected" may commence a civil action against a polluter for any *ongoing* violation of the statute. Citizens may sue to enforce effluent limitations, EPA orders, or state orders. The U.S. district courts may enforce effluent limitations, impose civil penalties, and award attorney fees. Prospective plaintiffs must give 60 days' notice to EPA, the state, and the violator before bringing the action. Defending facilities should make every possible effort to correct those violations during the 60 days; their reward will be dismissal of the action as to any corrected violation. Settlement agreements may include court-ordered compliance schedules, with stipulated penalties for failure to adhere to those schedules, and payment of court costs and attorneys' fees.

1209 OTHER CWA REGULATORY PROGRAMS. Other CWA programs are discussed in separate chapters, including:

A. **Wetlands.** Section 404 of the CWA establishes the primary Federal regulatory program protecting wetlands. Pursuant to this section and section 301 of the Act, discharges of dredged or fill material into wetlands and other waters of the United States are illegal—unless permitted or exempted from regulation. See Chapter 13.

B. **Oil pollution.** Section 311 of the CWA prohibits discharges of harmful quantities of oil and hazardous substances into waters of the United States. See Chapter 21.

C. *Discharges from vessels.* Vessels are a point source under the CWA, but present certain unique issues. See Chapter 22.

1210 CLEAN WATER ACT REAUTHORIZATION. Congress is considering legislation to reauthorize the CWA in 1994. Bills that have been introduced would waive sovereign immunity for fines and penalties, permit EPA administrative enforcement against Federal agencies, and strengthen nonpoint source requirements.

CHAPTER XIII
PROTECTION OF WETLANDS

1301 REFERENCES

- A. Clean Water Act (CWA), 33 U.S.C. §§ 1341, 1342 and 1344
- B. Rivers and Harbors Act (RHA), 33 U.S.C. §§ 403, 406
- C. Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456
- D. U.S. Army Corps of Engineers (COE) Regulations, 33 C.F.R. Parts 320-330; 40 C.F.R. Part 231
- E. Federal Interagency Committee for Wetland Delineation, Federal Manual for Identifying and Delineating Jurisdictional Wetlands (January 1989)
- F. U.S. Army COE, Wetlands Delineation Manual, Technical Report 4-87-1 (January 1987).
- G. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 19
- H. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 18

1302 POLICY. Wetlands are an important habitat for fish and wildlife, particularly for nesting, spawning, and rearing sites for aquatic and land species. As such, they are critical to food chain production. Wetlands protect other areas from wave action and shoreline erosion. In addition, they are a storage area for floodwaters and provide a natural purification and filtration system for our drinking water supply. Since the initial colonization of North America, perhaps as much as 50% of the wetlands that once existed in the continental United States have been destroyed. Consequently, the Administration has adopted a "no net loss of wetlands" goal to protect this natural resource. Implementing Executive Order 11990, the Assistant Secretary of the Navy (Shipbuilding and Logistics) promulgated the DON policy as follows:

It is the Department of the Navy policy to permit no overall net loss of Navy and Marine Corps wetlands and to avoid impacting wetlands wherever possible. . . . To that end, we must ensure that our commanding officers have adequate natural resources expertise to carry out these goals and to ensure identification of wetlands under their jurisdiction.

1303 WETLANDS DEFINED. Wetlands are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. Part 328.3(b).

A. Under normal circumstances, wetlands exhibit hydrophytic vegetation, hydric soils, and wetland hydrology. Both COE and the EPA are currently using the 1987 *Manual (Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 (January 1987))* to make wetland delineations. The 1987 *Manual* requires at least one positive indicator of all three wetlands criteria for an area to be classified as a wetland. Under the 1989 Delineation Manual (Federal Interagency Committee for Wetland Delineation, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands (January 1989)*) one criterion's presence can be presumed based on the presence of the other two. The only definitive way to determine if an area is a wetland is to seek a determination from the COE district office.

B. "Hydrophytic vegetation" is plant life growing in, near, or under water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content. Approximately 7,000 types of plants may grow in wetlands. Of these, about 27% are "obligates" (i.e., they almost always grow in wetlands under normal conditions). To assist in identification, you can get a list of wetlands vegetation for your region from the Fish and Wildlife Service (FWS).

C. "Hydric soil" is soil that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions near the surface. Hydric soil must be inundated (ponded) or saturated (soaked) with water for seven or more consecutive days during the growing season. The presence of hydric soil is indicated by:

1. Abundant decomposed plant material;
2. predominately bluish-gray, brownish-black, or black soil color 10-12 inches below the surface;
3. a rotten egg smell; or

4. sandy soil which has dark stains or streaks of organic material 2-3 inches below the surface.

D. "Wetland hydrology" refers to the permanent or periodic inundation or prolonged soil saturation sufficient to create anaerobic conditions in the soil. Indicators include:

1. water-logged soil;
2. "drift lines" or small piles of debris oriented in the direction of water movement through an area;
3. debris lodged by the water in or against trees or other objects;
4. water marks on trees or other vertical objects; or
5. thin layers of sediment deposits on leaves or other objects.

1304 THE 404 PERMITTING PROGRAM.

A. Wetlands regulation, in particular by the COE, predates the CWA by at least 50 years, and has its roots in congressional desire to preserve free and unimpeded navigation on the waterways of the expanding United States. The Rivers and Harbors Act (RHA) vested permit authority and responsibility for maintenance of structures upon navigable waters with the COE. The RHA, however, contained a limited reach. In writing the CWA, Congress expanded the COE's role to include pollution prevention in the form of dredge spoil and fill material. The CWA includes the discharge of dredge or fill into navigable waters in its definition of activities prohibited without a permit, 33 U.S.C. §§ 1311(a), 1344(b), expands the definition of "navigable waters" to include "waters of the United States, including the territorial seas", 33 U.S.C. § 1362(7), and sets the EPA to watch over the permit authority of the COE, 33 U.S.C. § 1344(b).

B. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout the regulations, and can mean different things depending on their statutory roots. It is important from the outset that the reader understand that "navigable waters" means something quite different under the CWA than under the RHA. Even the COE recognized the potential for confusion, and in 33 C.F.R. Part 328.1, offered a word of explanation:

This section [33 C.F.R. Part 328] defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy,

practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 C.F.R. Parts 320-330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated from both statutes (see 33 C.F.R. Parts 322 and 329).

"Navigable waters of the United States" under the RHA are defined in 33 C.F.R. Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to sections 9 and 10 of the RHA. "Navigable waters" under the CWA are subsumed in the regulatory definition of "waters of the United States", found at 33 C.F.R. Part 328.3. Counsel should note that the COE's definition includes "navigable waters" as defined under the CWA, 33 U.S.C. § 1362(7).

C. In short, "navigable waters" under the CWA includes "waters of the United States" and has been held by the courts to be far, far more expansive than the "navigable waters" as defined under the RHA. Some examples of "navigable waters" under the CWA include temporary ponds and man-made impoundments. It is in the "navigable waters" under the CWA that permits are required for the discharge of dredged or fill material. As a result of the broader definition "navigable waters of the United States" in the CWA, as compared with that of the RHA, section 404 of the CWA is the primary tool for protection of wetlands.

D. Unless exempted, no one may discharge dredged or fill material into waters of the United States without a permit issued by the COE or a state with permitting authority. The term "discharges of fill material" is interpreted very broadly by regulators. It includes "the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction." 33 U.S.C. § 323(f). All Federal agencies except for the COE usually must obtain an individual or programmatic permit or qualify under a nationwide permit if they engage in a regulated activity. An agreement for construction or engineering services performed by the COE for other Federal agencies does not satisfy the permitting requirement. Finally, even if the permit issues from the COE, the EPA possesses veto authority if it finds that the COE's action will "have an adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." 33 U.S.C. § 1344(c).

E. **Exemptions.** Several exemptions to the permit requirement exist. Permits are not required, for example, for:

1. The discharge of fill material during construction of a Federal project specifically authorized by Congress, provided the effects of the discharge have been considered in an environmental impact statement (EIS);
2. construction of temporary sedimentation basins on a construction site that does not result in a discharge to a navigable water of the United States;
3. maintenance of drainage ditches, etc., where the maintenance does not include any modification that changes the character, scope, or size of the original fill design; or
4. maintenance or emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, bridge abutments or approaches, provided the emergency reconstruction occurs within a reasonable time after the damage. 33 U.S.C. § 1344(f) and (r).

F. **Permits.** Permits can be issued by either the district engineer, division engineer, or Chief of Engineers. Typically, the more controversial the proposed project, the higher the approval authority. The COE can issue two types of permits—general and individual.

1. General permits can be obtained faster and more easily than individual permits. General permits can be issued for activities that are similar in nature and will only have a minimal individual or cumulative impact. The most important general permits are the "nationwide permits (NWP)."

2. Where a NWP is applicable, the COE usually does not even have to be notified so long as all conditions of the permit are observed. NWP are listed at 33 C.F.R. § Part 330, app. A. Numerous conditions and required management practices apply. A water quality certification or waiver may be needed from the state if a discharge is involved under 33 U.S.C. § 1341. Activities covered by NWPs include:

- a. Maintenance — repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill (NWP #3);
- b. maintenance — repair, rehabilitation, or replacement of any currently serviceable structure or fill constructed prior to the requirement for authorization under 33 C.F.R. Part 330.3 (NWP#3);

c. road crossings — certain minor road crossing fills, that are culverted or bridged with fill of less than 1/3 acre (NWP #14); and

d. headwaters and isolated waters discharges — dredge or fill activities that adversely affect wetlands of less than 10 acres. The proponent of the action need not notify the COE if less than one acre of wetlands will be adversely affected (NWP #26).

3. An individual (or standard) permit must be processed through the public interest review process. Activities that adversely affect more than one acre but less than ten acres must be reported to the local COE District office. They then have 20 days in which they can require the agency to apply for an individual permit. The clear trend is to require an individual permit when more than one acre of wetlands is affected. In any event, all activities that adversely affect more than ten acres of wetlands will require an individual permit.

4. Programmatic permits must be applied for like individual permits. Once obtained, however, programmatic permits obviate duplicate applications for similar activities required by the same program. 33 C.F.R. § 325.5.

G. *The individual permit process.* The process for obtaining an individual permit is described at 33 C.F.R. Part 325. Following a pre-application consultation with the COE, the Federal agency submits the application and COE assigns it an identification number. The COE gives public notice of the application within 15 days of receiving all necessary information. This begins a 15-30 day public comment period, after which the COE will review the proposal and any public comment.

1. The COE will consult with other Federal agencies as appropriate, particularly if the proposed action may affect endangered species or historic properties. A public hearing must be held at the request of any interested person unless their articulated reasons for the hearing are deemed to be "insubstantial." If doubt exists, the hearing "shall" be held.

2. The COE reviews all public comment. In deciding whether to issue a permit, the COE considers the following factors: conservation; economics; aesthetics; flood hazards; navigation; recreation; public concern; water quality; the practicability of alternative locations or methods; and the extent of the beneficial and detrimental effects the activity is likely to have on the public and private uses for which the area is suited.

3. When wetlands are potentially affected by a proposed activity, the COE asks:

a. Is there a practicable alternative? If the project is not water dependent, the COE presumes that practicable alternatives are available unless it is clearly demonstrated otherwise. Practicable alternatives that do not require discharges into wetlands are presumed to have less adverse impact on aquatic ecosystems unless clearly demonstrated otherwise. The practicable alternatives analysis requires considering the project's economics as well as the use of sites not presently owned by the applicant if they can be reasonably obtained.

b. Have all reasonable mitigation efforts been employed? Mitigation generally includes minimizing adverse impacts through avoidance. Where adverse impacts still occur, mitigation by repairing, restoring, or replacing the affected wetlands is required. EPA requires a one-for-one replacement of the area lost for ponded, emergent, or herbaceous wetlands. For forested wetlands, a two-for-one replacement is required.

H. **EPA veto authority.** Under 33 U.S.C. § 1344(c), EPA may veto COE permits by denying or restricting the use of any area as a disposal site for dredged or fill material. Statutory grounds for an EPA veto are unacceptable adverse effects on: municipal water supplies; shellfish beds and fishery areas; wildlife; or recreation areas.

1. If the EPA Regional Administrator notifies the regional engineer in writing that he intends to issue a public notice of a proposed determination to deny, restrict, or withdraw an area from consideration for use as a disposal site, the COE will not issue a 404 permit.

2. The proposed decision to veto a permit must occur after a public comment period of 30 to 60 days. If the Regional Administrator determines that there is "significant public interest" in the proposed determination, a public hearing will be held. 33 U.S.C. § 1344(j).

1305 SANCTIONS FOR NONCOMPLIANCE

A. **Civil penalties.** No officer, agent, or employee of the United States can be personally liable for any civil penalty arising from performance of official duties in connection with the requirements discussed in this chapter. 33 U.S.C. § 1323.

B. **Criminal penalties.** Knowing and negligent violations carry a maximum punishment of \$25,000.00 fine and one year imprisonment for each violation in the first conviction; a \$50,000.00 fine and two years' imprisonment for

subsequent convictions. Violators may also be prosecuted under the CWA's "knowing endangerment" provision. 33 U.S.C. § 1319.

C. **Civil remedies.** Judicial remedies, including injunctive relief, may be awarded in citizen suits under 33 U.S.C. § 1365.

1306 IMPLEMENTING DON POLICY. To implement the DON policy, responsible officials should ensure:

A. That all facilities and operational actions avoid, to the maximum degree feasible, wetlands destruction or degradation;

B. that any facilities requirement that cannot be sited to avoid wetlands shall be designed to minimize wetlands degradation and will include appropriate compensatory requirements in all phases of the project's planning, programming, and budgeting process;

C. that any action affecting wetlands is given proper consideration in the environmental review and public notification process;

D. that boundaries of legally defined wetlands, on all Navy lands, are identified and mapped before FY-95; and

E. ensure the cognizant REC and EFD are consulted in any project or issue involving wetlands.

CHAPTER XIV
SAFE DRINKING WATER ACT (SDWA)

1401 REFERENCES

- A. Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f *et seq.*
- B. EPA SDWA Regulations, 40 C.F.R. §§ 141-147
- C. DOD Directive 6230.1, Subj: SAFE DRINKING WATER (April 24, 1978)
- D. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 9
- E. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 8

1402 OVERVIEW

A. Prior to the 1970s, the Federal Government had a limited role in the regulation of drinking water. This role was altered, however, in 1974 by Congress' passage of the Safe Drinking Water Act (SDWA) and assignment of responsibility for its administration to EPA. The SDWA accomplishes its objective in two ways. First, contaminants in tap water delivered via public water systems (PWSs) are limited to maximum contaminant levels (MCLs) set by EPA in National Primary Drinking Water Regulations (NPDWR). It is the responsibility of the PWS operator to meet the NPDWR. Second, contamination of groundwater used for drinking water is minimized through three separate programs: (1) underground injection control (UIC); (2) wellhead protection programs; and (3) sole source aquifer protection programs.

B. Under section 300-j6 of the SDWA, Federal facilities are expressly subject to all applicable Federal, state, and local PWS and UIC requirements whether substantive or administrative. A separate waiver of sovereign immunity, applicable to the Wellhead Protection Programs, is contained in section 300h-7(h) of the SDWA. No waiver exists for the Sole Source Aquifer Program.

1403 **DEFINITIONS**

A. **Fluids.** For purposes of the Underground Injection Control Program, fluids are defined as "any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state." 40 C.F.R. 144.3.

B. **Maximum Contaminant Level Goal (MCLG).** Nonenforceable goals set by EPA for contaminants "which in the judgment of the Administrator may have any adverse effect on the health of persons and which is known or anticipated to occur in public water systems." 40 C.F.R. 141.2.

C. **Maximum Contaminant Level (MCL).** MCL means the "maximum permissible level of a contaminant in water which is delivered to any user of a public water system," except in the case of turbidity where the maximum permissible level is measured at the point of entry to the distribution system. Contaminants added to the water under circumstances controlled by the user, except those resulting from corrosion of piping and plumbing caused by water quality, are excluded from this definition. MCLs are set as close as feasible to the MCLG, considering technology, practicability, and cost. 42 U.S.C. § 300f(3).

D. **Public Water System (PWS).** Any collection, treatment, storage, or distribution facility for the provision of piped water for human consumption, provided that the system for which it exists has at least 15 service connections or regularly serves an average of at least 25 individuals daily for at least 60 days per year. Note, however, that per 40 C.F.R. 141.3, activities that have water distribution and storage systems, but purchase water from private or municipal utilities and do not treat or sell water, are not required to meet EPA water system regulations under Part 141. 42 U.S.C. § 300f(4).

E. **Treatment Technique Requirements.** Requirements which are set for contaminants which are technologically difficult or costly to measure. For these contaminants, EPA may choose to require specific water treatment practices (such as filtration or corrosion control) to prevent health problems. This is done instead of setting an MCL for these contaminants. 42 U.S.C. § 300g-1(b)(7)(A)

F. **Underground Injection or Well Inspection.** "(T)he subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. Under the EPA definition, a septic tank tile-field system is not included. Surface impoundments where the depth is less than the largest surface dimension and where the principal function is above surface emplacement of fluids may also be excluded." 40 C.F.R. 144.3.

A. **General.** The SDWA authorized EPA to develop two types of national drinking water standards: NPDWRs and National Secondary Drinking Water Regulations (NSDWRs). The primary standards are meant to protect against adverse health effects to humans from the consumption of drinking water and are enforceable against PWSs. NSDWRs are designed to protect aesthetic qualities of drinking water, such as odor or appearance, and are not enforceable against PWSs under Federal law; however, states may adopt and enforce NSDWRs under their own laws.

B. **NPDWRs.** The development of primary drinking water standards is accomplished through a two-step process.

1. EPA first sets MCLGs for those contaminants which may have an adverse effect on the human health and which are known or anticipated to occur in PWSs." A contaminant can be anything which is not water—including physical, chemical, biological, or radiological matter. MCLGs are not enforceable standards. 42 U.S.C. § 300g-1.

2. Once an MCLG is determined for a particular contaminant, EPA then establishes a MCL. MCLs are mandatory limits on drinking water contaminants; an MCL is the maximum permissible level of a contaminant in water delivered to the consumer. EPA sets the MCL "as close as feasible" to the parallel MCLG, considering available technology, practicability, and cost. If an MCL is not technically or economically achievable for a particular contaminant, then EPA may require a specified treatment technique for that contaminant. Each MCL is usually accompanied by specific monitoring requirements. MCLs are enforceable standards for PWSs.

C. **Variances and exemptions.** Under the SDWA, PWSs are able to obtain variances and exemptions from the primary standards under certain circumstances. These allowed deviations from the statute have become increasingly important over the past few years given the large number of new standards that have been issued. The following provides general information on applicable variances and exemptions.

1. A PWS may receive a variance if an MCL cannot be met despite application of the best available treatment technology "because of characteristics of its raw water sources." This variance can be granted only if notice and opportunity for a public hearing is given, and the variance will not result in an unreasonable risk to public health. 42 U.S.C. § 300g-4(a)(1)(A).

2. A PWS may also be granted a variance from a treatment technique if the PWS demonstrates that the treatment technique is not necessary due

to the quality of its raw water supply or that an alternative technique is "at least as efficient" in removing a contaminant and agrees to use that technique. 42 U.S.C. § 300g-4(a)(1)(B) and (a)(3).

3. Exemptions from MCLs may be granted "due to compelling factors." Cost is considered a compelling factor. Exemptions cannot be given until notice and opportunity for a public hearing has been given. Additionally, exemptions must provide for eventual compliance with the MCL and cannot result in unreasonable risks. Exemptions are usually given for one year, with extensions possible for a total of three years. 42 U.S.C. § 300g-5(a)(1).

D. **State programs.** The SDWA provides that states shall have the primary enforcement responsibility for public water systems provided their programs meet certain minimum criteria. As long as the states meet these criteria, EPA may not directly enforce SDWA requirements against PWSs. EPA has established a formal process by which a state qualifies as having primary enforcement responsibility—also known as "primacy."

1. To have primacy, states must (1) have drinking water regulations as stringent as EPA's; (2) have adequate enforcement procedures; (3) keep records and report information to EPA; (4) provide variances and exemptions in manner at least as stringent as EPA's; and (5) have an emergency plan for drinking water emergencies. 42 U.S.C. § 300g-2.

2. As of April 1993, only Wyoming and the District of Columbia had not demonstrated primacy under the SDWA. EPA has continuing authority to withdraw primacy in the event a state's program no longer meets the requirements of the SDWA.

E. **Reporting violations.** Commands operating public water systems must report to EPA regional offices or the cognizant state instances of noncompliance with primary national standards, variances or exemptions, and any failure to comply with sampling / monitoring requirements. Noncompliance conditions must be reported to all persons served by the public water system and to the Navy chain of command.

1. Federal public notification requirements are contained in 40 C.F.R. 141.32. Under these rules, PWSs must disclose violations in the local newspaper within 14 days of their occurrence. The newspaper notice is to be augmented by written notification to each customer by mail, or by hand, within 45 days (unless the violation is corrected before the notification is due). If the violation poses an acute risk, it must be reported to local radio and television stations within 72 hours of the violation. EPA requires that specific language generally be used to describe the health basis for the MCL that has been violated. States with primary enforcement authority may have additional or different reporting requirements.

2. If the EPA discovers a violation of an MCL, variance, or exemption, it must notify both the state and the PWS, and then provide assistance in bringing the PWS back into compliance. 42 U.S.C. § 300g-3(a)(1)(A).

F. **Enforcement.** States authorized primary enforcement authority are responsible for ensuring compliance with drinking water standards. If a state fails to discharge its responsibilities, EPA may step in to take enforcement action. Should a state fail to respond within 30 days to an EPA Notice of Violation (NOV), EPA must then issue either a compliance order to the PWS or commence a civil action to ensure compliance. 42 U.S.C. § 300g-3(a)(1)(B).

1. EPA compliance orders do not take effect until after notice and opportunity for public hearing. Unlike other Federal environmental statutes, the initial compliance order cannot assess administrative penalties. Violations of the initial order will result in the issuance of a second order under which an administrative penalty of up to \$5,000.00 per violation may be assessed. If a civil action is commenced, EPA can obtain both injunctive relief and penalties of up to \$25,000.00 per day per violation. The SDWA may also be enforced by private citizens in Federal district court. 42 U.S.C. §§ 300g-3(g)(2) and 300j-8.

2. In addition to violations of MCLs, EPA can also commence enforcement actions for violations of the public notification and monitoring requirements. With these violations, EPA is not required to first notify the state prior to proceeding with an action. Civil penalties of up to \$25,000.00, or administrative penalties of up to \$5,000.00, may be imposed for notification or monitoring violations. 42 U.S.C. § 300g-3(c).

3. The EPA also has broad authority to act when the presence of a contaminant in a PWS or underground source of drinking water presents an imminent and substantial danger to public health. 42 U.S.C. § 300i(a).

4. The SDWA also provides for the imposition of criminal penalties against anyone who tampers, or attempts to tamper, with a public water system with the intent to harm human health. Penalties for these violations include imprisonment up to five years (three years for attempts) and fines up to \$50,000.00 (\$20,000.00 for attempts). Tampering is defined as the introduction of "a contaminant into a public water system with the intention of harming persons." 42 U.S.C. § 300i-1.

G. **Miscellaneous provisions**

1. **Lead prohibition.** After 1986, the use of lead pipe, solder, or flux in the installation or repair of any public water system or plumbing in residential or nonresidential facilities providing water for human consumption is prohibited.

Owners or operators of PWSs must notify EPA and, where applicable, state and local agencies of instances where lead in drinking water exceeds 50 ppb (parts per billion).

2. *Water system operator certification.* Per OPNAVINST 5090.1A, Navy water system operators must meet certification requirements of the state in which the system is located.

1405 UNDERGROUND INJECTION CONTROL (UIC)

A. *General.* Under the SDWA, the disposal of wastes directly into subsurface areas through wells is regulated by the UIC program. By EPA estimates, there are approximately 400,000 injection wells in the United States subject to UIC requirements. The goal of the UIC program is to ensure that contaminants never reach underground water sources. This goal is accomplished by setting standards designed to prevent fluids from leaking out of wells into drinking water sources.

B. *Requirements.* The injection of any fluid into a well regulated by the UIC program is prohibited without a permit, unless authorized by rule. However, no injection is allowed if it would endanger an underground source of drinking water (USDW). New wells must be permitted prior to construction. Area permits are available where a number of wells in a geographic area are subject to the same conditions. The substantive standards of the UIC program can vary depending on the proximity of the well to a USDW and the type of fluids being injected. The EPA has divided all UIC into five classes, each subject to differing regulatory requirements. 40 C.F.R. 144.6.

C. *State role.* Like the PWS program, states can exercise primary enforcement responsibility (or primacy) over its UIC program if such program is approved by EPA. State programs must meet Federal minimum standards, but can also implement more stringent state requirements. The EPA implements a Federal UIC program for states without approved programs. Even with an approved state program, EPA retains oversight authority and may withdraw program approval if it is found to be deficient. 42 U.S.C. § 300h-1.

D. *Enforcement.* To enforce the UIC program, EPA can issue compliance orders for violations and may include in the order an administrative penalty of up to \$10,000.00 per day per violation up to a maximum of \$125,000.00. Courts can assess civil penalties up to \$25,000.00 per day and may impose a prison sentence up to three years for willful violations. Citizen's suits may also be brought by individuals. In states that have primacy, EPA can take direct enforcement action against violators if a state does not take action within 30 days of being notified by EPA. 42 U.S.C. § 300h-2.

E. **Navy policy.** For the protection of groundwater, Navy activities are directed to eliminate underground injection where disposal alternatives are available. See OPNAVINST 5090.1A.

1406 WELLHEAD PROTECTION PROGRAMS

A. **General.** The 1986 SDWA Amendments (42 U.S.C. § 300h-7) required each state to implement by June 1991 an EPA-approved Wellhead Protection Program. The purpose of the program was to prevent the contamination of the surface and subsurface areas surrounding wells that supply PWSs with drinking water. As of April 1993, 26 states had EPA-approved Wellhead Protection Programs.

B. **Requirements.** The SDWA requires that each state program shall: (1) specify the duties of agencies that will conduct the program; (2) for each wellhead, determine the wellhead protection area; (3) identify within each wellhead protection area all potential sources of contaminants; (4) describe a program that will protect the area from contaminants identified; and (5) include contingency plans for the location and provision of alternate drinking water supplies for each public water system in the event of well contamination. 42 U.S.C. 300h-7(a).

C. **Enforcement.** EPA cannot compel a state to develop a Wellhead Protection Program and, unlike the UIC program, is not authorized to develop and implement a Federal program in the absence of a state program. Additionally, EPA cannot enforce the provisions of state programs. However, Federal facilities are required to comply with the requirements of state Wellhead Protection Programs. Because state programs may be enforceable under state law, facilities operating in wellhead protection areas should have knowledge of applicable state requirements. 42 U.S.C. 300h-7(h).

1407 SOLE SOURCE AQUIFERS

A. **General.** Under SDWA (42 U.S.C. § 300h-3(e)), EPA has the authority to determine whether a groundwater aquifer is the "sole or principal drinking water source for the area." If such a determination is made, EPA may designate the aquifer as a Sole Source Aquifer (SSA). The primary effect of such a designation is that it bars Federal financial assistance of any kind for projects which could contaminate the SSA and thus create a significant hazard to public health.

B. **Critical Aquifer Protection Areas (CAPA).** The 1986 amendments to the SDWA (42 U.S.C. § 300h-6) contained a provision whereby states would develop for EPA approval comprehensive management plans for CAPAs. A CAPA is located within sole or principal source aquifers. The significance of these state plans

Consolidated Environmental Law Deskbook

is that they may contain limits on "federal, state, and local government, financially assisted activities and projects which may contribute to degradation of such ground water. . . ." 42 U.S.C. § 300h-6(f)(2)(C).

C. **Enforcement.** No sovereign immunity waiver expressly applies to SSA plans developed by states. However, SSA requirements should be considered in NEPA planning.

1408 EPA HOTLINE

The EPA maintains a hotline to answer SDWA questions from Federal facilities and the general public. Their number is (800) 426-4791, Monday through Friday, during East Coast working hours.

1409 ADDITIONAL READING

For a detailed examination of this subject, see Lieutenant Colonel Paul R. Smith USMC, *The Impact of the Safe Drinking Water Act Amendments of 1986 on Military Installations: How Real is the Encroachment Threat?* 38 Naval L. Rev. 49 (1989).

CHAPTER XV

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

1501 REFERENCES

- A. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*
- B. Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 96-482 (Nov. 8, 1984)
- C. Federal Facility Compliance Act (FFCA), Pub. L. No. 102-386 (Oct. 6, 1992)
- D. EPA Implementing Regulations, 40 C.F.R. Parts 260-272 (all citations herein to the regulations are to Title 40 of the C.F.R. unless otherwise indicated)
- E. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Chs. 9 and 10
- F. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Chs. 9 and 10

APPENDIX

- A. Defense Reutilization and Marketing Service

1502 SCOPE. This chapter addresses the hazardous waste and solid waste management and cleanup requirements of RCRA. Requirements pertaining to underground storage tanks (RCRA Subtitle I) or medical waste (RCRA Subtitle J) are contained in Chapter 16 and Chapter 25, respectively. The scope of this chapter also does not allow for a discussion of individual state laws or requirements. Although this chapter may assist in interpreting requirements in states that have incorporated Federal RCRA regulations as their own to obtain program authorization, often there are significant differences in substance or interpretation.

1503 INTRODUCTION

A. The Solid Waste Disposal Act (SWDA) was the precursor of RCRA and was first enacted in 1965 as a grant in aid assistance to states to address open burning dumps. RCRA amended and essentially rewrote the SWDA in 1976 transforming it into a full regulatory program aimed at hazardous waste (HW) disposal practices. Still today, RCRA is often referred to as the SWDA.

B. The regulation of HW has proceeded along two lines of development. Initially, the laws and regulations addressed only the ongoing generation, transportation, and disposal of such waste. With the passage of HSWA in 1984, RCRA was amended to address HW emergencies and the cleanup of old inactive sites.

C. RCRA was further amended in 1992 with the passage of the Federal Facility Compliance Act (FFCA). The FFCA waived Federal sovereign immunity from monetary penalties and added substantive amendments to RCRA dealing with issues of specific Federal concern. RCRA enforcement procedures are addressed in Chapter 3, *Federal Facility Compliance*. The substantive amendments are addressed below.

D. Although RCRA is a complex regulatory scheme, the organization of RCRA is relatively simple. For example, RCRA statutory requirements are broken out by subtitle. Subtitle C addresses HW, Subtitle D addresses solid waste, and Subtitle F addresses Federal agency obligations. The regulations are organized by regulated substances and entities. 40 C.F.R. Part 261 addresses solid and hazardous wastes; Part 262 contains generator requirements; Part 263 contains transporter requirements; Parts 264 and 265 contain requirements for permitted facilities and interim status facilities; Part 268 contains land disposal standards; and Part 270 contains permit application procedures.

E. The **key** to understanding RCRA is understanding RCRA terminology. RCRA applies only to the extent one is involved with the generation, transportation, treatment, storage, or disposal of HW. Therefore, it is essential to understand the meaning of those terms and other RCRA terms to determine whether RCRA applies and what it requires. Do not rely on common usage of terms used in RCRA. Often, it will be necessary when looking to a definition to ascertain the definition of terms used within that definition. Although RCRA definitions are located primarily in RCRA section 1004 (42 U.S.C. § 6903) and 40 C.F.R. 260.10 and 270.2, other definitions are scattered throughout RCRA.

F. Many states passed laws similar to RCRA after the 1976 amendments to the SWDA. Most are patterned after RCRA in contemplation of obtaining EPA authorization pursuant to section 3006 (42 U.S.C. § 6926) of RCRA to establish a HW program.

1504 PURPOSE. The purpose of RCRA is generally threefold:

- A. To provide a system for tracking and preserving records of the movement of HW from its origin to ultimate disposal (cradle to grave).
- B. To ensure the disposal of HW is accomplished by means that prevent escape of HW into the environment (perpetual care).
- C. To provide an enforcement mechanism to ensure compliance.

1505 REGULATED SUBSTANCES

A. As stated above, RCRA applies to generators, transporters, and owners and operators of treatment, storage, and disposal facilities *to the extent that each is with HW*. This section addresses the definition of solid waste and HW. The following sections will address the entities and operations regulated.

B. The definition of solid waste is important to understanding HW because HW waste is a subset of solid waste. In other words, to be "termed hazardous," a waste must first be a solid waste. Thus, the exemptions to the definition of solid waste apply also to a waste that might otherwise be an HW.

C. Under section 1004(27) (42 U.S.C. 6903(27)) of RCRA, solid waste is defined as "garbage; refuse; sludge from a waste treatment plant, water supply treatment plant, or pollution control facility; and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and community activities." RCRA regulations further define the "other discarded material" portion of the solid waste definition. A discarded material is one that is abandoned, recycled, or considered inherently waste-like. 40 C.F.R. § 261.2(a)(2). Material is abandoned if it is disposed of or accumulated, stored, and treated prior to or in lieu of disposal. 40 C.F.R. § 261.2(b). Inherently waste-like materials, in addition to those listed, are any materials ordinarily disposed of, burned, or incinerated. 40 C.F.R. 261.2(d).

D. HW is defined under section 1004(5) (42 U.S.C. § 6903(5)) of RCRA as a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or serious irreversible illness or pose a substantial present or potential threat to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

E. The regulations further refine the definition of HW for purposes of RCRA Subtitle C (42 U.S.C. §§ 6921-6939b) requirements and are the provisions most

commonly referred to when ascertaining the status of a waste. A waste, for purposes of Subtitle C, is considered hazardous if it has been listed or because it exhibits one or more of the four hazardous characteristics. Listed wastes are found in 40 C.F.R. Part 261 (261.31-33). The four characteristics of HW are also found in Part 261 and include ignitability (261.21), corrosivity (261.22), reactivity (261.23), and toxicity as determined by the Toxicity Characteristics Leaching Procedure (TCLP) which is the measure of the material's tendency to leach (261.24). The test for TCLP is designed to simulate the physical process that would occur in a landfill and can be found at Part 261, Appendix II. Some states regulate as hazardous wastes other wastes not covered by the RCRA regulations (e.g., asbestos or PCBs). Whether the Federal Government must comply with those state requirements depends on whether such state wastes meet the RCRA statutory definition of "solid waste" and "hazardous waste" which define the scope of the waiver of sovereign immunity in RCRA section 6001. 42 U.S.C. § 6961. The fact that such state HWs are not listed in Part 261 of the Federal regulations is no defense because, Part 261 is limited to RCRA Subtitle C purposes only. The Federal waiver is not in Subtitle C, but in RCRA Subtitle F.

F. The *mixture rule* addresses the status of a mixture HWs and other wastes. The rule is different for characteristic and listed HWs. The mixture of a characteristic HW and other waste is not an HW so long as the mixture no longer exhibits any HW characteristics. 40 C.F.R. § 261.3(a)(2)(iii). The mixture of a listed HW and other waste is an HW even if the mixture is not hazardous. 40 C.F.R. § 261.3(a)(2)(iv). There are five regulatory exemptions for mixtures involving certain wastewaters. 40 C.F.R. § 261.3(a)(2)(iv)(A-E). In addition, a court recently struck down the RCRA mixture rule because of improper rulemaking. *Shell Oil Co. v. U.S. EPA*, 950 F.2d 751 (D.C. Cir. 1991). Since then, the rule has remained in effect on a temporary basis with EPA reviewing the entire RCRA scheme for HW identification. See, e.g., 57 Fed. Reg. 21,450 (1992) (May 20, 1992), containing proposed rules later withdrawn on HW identification options. Notwithstanding the challenge to the RCRA mixture rule, state mixture rules remain in effect to the extent they have not been independently challenged and struck down.

G. The *derived from rule* applies to the residue of HW after treatment. Again, different rules exist for characteristic and listed HWs. Any solid waste generated from the treatment of a characteristic HW is an HW only if the residue exhibits an HW characteristic. And, like the mixture rule, any solid waste generated from the treatment (e.g., incineration) of a listed HW is an HW. 40 C.F.R. § 261.4(c) and (d).

H. The norm in RCRA is that for every rule there are ten exemptions. The following identifies the principal statutory and regulatory exemptions to the definitions of solid waste and HW.

1. Solid or dissolved material in domestic sewage is exempt from the definition of solid waste. RCRA § 1004(27) (42 U.S.C. § 6903(27)). The regulatory exemption for the mixture of domestic sewage and industrial waste to a publicly owned treatment works (POTW) (40 C.F.R. § 261.4(a)(1)) is based on this statutory exemption.

2. Industrial discharges which are point sources having a Clean Water Act (CWA) NPDES permit are exempt from the definition of SW. RCRA § 1004(27). The regulatory exemption for point source discharges is at 40 C.F.R. § 261.4(a)(2).

3. Radioactive wastes regulated by the Nuclear Regulatory Commission (NRC) pursuant to the Atomic Energy Act (AEA). The exception is "mixed waste", i.e., radioactive wastes mixed with a RCRA HW. RCRA regulates the HW portion of the mixed waste. Office of Solid Waste and Emergency Response (OSWER) 9432.00-2, 8 Jan 87.

4. Household wastes are excluded from the definition of HW, but remain within the definition of solid waste. 40 C.F.R. § 261.4(b)(1).

5. Many wastewater sludges and industrial sludges that do not exhibit the TCLP characteristic are excluded from the definition of HW, but remain solid waste. 40 C.F.R. § 261.4(b) and (c).

6. Wastes produced by small quantity generators (SQGs) are excluded subject to complying with small quantity generator requirements. 40 C.F.R. § 261.5. Hence, the name "conditionally exempt" SQGs. Small quantity limitations are no more than 100 kg / month of HW and no more than 1 kg / month of acutely HW. Calculation of the amount of HW generated does not include HW reclaimed or reused nor HW produced onsite through HW treatment. 40 C.F.R. § 261.5(d). It also does not include the mixture of HW with other waste so long as the resultant mixture is not hazardous. 40 C.F.R. § 261.5(h) and (i).

7. Reused, recycled, and reclaimed materials are regulated, but not the recycling / reclamation process, unless such materials are exempt from regulation. 40 C.F.R. § 261.6(b)-(c). The open question is: when does the recycling process begin? See *Am. Mining Congress v. EPA*, 854 F.2d 1175 (D.C. Cir. 1987).

8. PCBs are regulated exclusively under the Toxic Substances Control Act (TSCA). *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988) (PCBs are not RCRA HW). However, new PCB regulations incorporate RCRA-type requirements (e.g., generator number, manifesting, etc.). See 40 C.F.R. Part 761. EPA does regulate HWs containing PCBs. 52 Fed. Reg. 25,760 (1980) (July 6, 1988).

9. Empty HW containers are not regulated if cleaned in accordance with the criteria in 40 C.F.R. § 261.7. A lined container is exempt from regulation if the liner prevented contact of HW with the container and the liner is removed.

10. The delisting of HW can be obtained at a particular generating facility by petition to EPA. 40 C.F.R. § 260.22(a). The applicant must show that the waste produced at the facility does not meet any of the criteria under which it was listed. Mixture rule or derived from rule wastes can also be delisted upon the same showing. 40 C.F.R. § 260.22(b).

1506 GENERATORS

A. This section begins the shift away from substances regulated to entities regulated under RCRA. Generator is defined by regulation (no statutory definition) as "any person, by site, whose act or process produces HW identified or listed in Part 261 or whose act first causes HW to become subject to regulation." 40 C.F.R. § 260.10. It is important to note from the definition that a generator need not be the owner or operator of an industrial process. Generator status can be conferred as a result of hazardous material spills, hazardous materials stored in excess of shelf-life, and the failure to comply with RCRA transportation or treatment, storage, and disposal (TSD) requirements.

B. The generator's obligations and duties are contained in 40 C.F.R Part 262 and are generally described below:

1. **Identification of waste.** Generators are responsible for determining if the waste they generate is hazardous, including testing if necessary, or if the waste is otherwise excluded. See 40 C.F.R. § 262.11.

2. **Generator identification number.** A generator must obtain a generator identification number at every site where HW is generated. 40 C.F.R § 262.12. An individual generation site for HW is defined "as the contiguous site at or on which one or more HWs are generated." 40 C.F.R. § 260.10. An individual generation site, such as a large manufacturing plant, may have one or more HW sources, but is considered an "individual generation site" if the property is contiguous. Some states may require separate identification numbers. EPA has authority to issue temporary identification numbers in emergencies or unusual situations. 45 Fed. Reg. 85,022 (1980).

3. **Manifest system.** Generators must prepare manifests (shipping documents) for all HWs leaving the site. The generator must certify on the manifest that it has a waste minimization program in accordance with section 3005 of RCRA (42 U.S.C. § 6925) and that the treatment, storage, and / or disposal method to be

utilized minimizes present and future health risks. RCRA § 3002(b) (42 U.S.C. 26922(b)). The uniform manifest system precludes the requirement for separate state manifests. 49 U.S.C. § 1811(a); 49 Fed. Reg. 10,492 (1984).

4. **Packaging, labeling, marking, placarding.** Generators are responsible for packaging their waste, labeling packages, marking packages and containers with required warnings, and offering to provide the transporter with required placards. 40 C.F.R. § 262.30-33; 49 C.F.R. Parts 172, 173, 178, 179 (Department of Transportation (DOT) regulations).

5. **Recordkeeping and reporting.** Generators are the primary custodian of the manifest paperwork. The TSD facility is required to send a completed, signed manifest to the generator who must retain the record for three years from the date the waste was accepted for interstate transportation by the transporter. The three-year time period can be extended if enforcement action is pending. 40 C.F.R. § 262.40(a) and (d). Other recordkeeping requirements include test results, waste analysis, and other waste determinations made pursuant to 40 C.F.R. § 262.11. Biennial reports and exception reports must be kept for three years after the due date of the report. 40 C.F.R. § 262.40(b). An exception report must be filed with the EPA Regional Administrator by the generator when a completed and / or signed manifest is not returned to the generator within 45 days after shipment. 40 C.F.R. § 262.42. Biennial reports are to be filed with the EPA Region by 1 March of each even-numbered year. The report addresses the generator's HW activities and output during the past odd-numbered year. The report also requires that minimization efforts be addressed to reduce HW volume and toxicity. RCRA § 3002(a); 40 C.F.R. § 262.41.

6. **Ninety-day storage.** A generator can accumulate HW on site for up to 90 days. 40 C.F.R. § 262.34(a). Each HW container in storage must be labeled showing the date the HW was placed in the container. If HW is stored for more than 90 days at the 90-day facility, the generator is considered the operator of an HW storage facility and subject to regulation under Parts 264, 265, and 270. See §§ 262.34(b), 268.50(a)(1). The 90-day storage area must comply with Part 265, Subparts I (container storage) or J (tank storage), except closure, post-closure, and financial requirements. 40 C.F.R. § 262.34(a)(1). Ninety-day storage is allowed only in containers or tanks. The containers must be labeled showing the accumulation date and marked "hazardous waste." 40 C.F.R. § 262.34(a)(2) and (3). Tanks must be managed to ensure they are emptied at least every 90 days and records retained to verify this occurred. Emergency preparedness and contingency planning requirements of Part 265, Subpart C, D must also be complied with. 40 C.F.R. § 262.34 (a)(4).

7. **Satellite accumulation.** Generators are allowed to accumulate up to 55 gallons of hazardous waste or 1 gallon of acute hazardous waste in

containers at or near the point of generation. 40 C.F.R. § 262.34(c). The quantity limit is a cumulative total applying to all HW at the accumulation area; it is not a separate limit for each waste. There is no limit on the number of accumulation areas allowed at a facility, and separate areas should be created for different wastes to avoid problems with the 55-gallon cumulative limit. The satellite accumulation area must be located as close as practicable to the point of generation and be under the control (e.g., lock and key) of the operator of the process generating the waste.

8. **Land disposal standards.** Land disposal standards are contained in 40 C.F.R. Part 268 and apply to generators, transporters, and owners and operators of TSD activities. Because land disposal standards have the most impact on generators, the requirements are addressed in this section. Land disposal standards require that a generator identify its waste and determine whether it is restricted from land disposal under Part 268. 40 C.F.R. § 268.7(a). If the HW is restricted from land disposal, the generator must test the waste to determine whether treatment standards are met. The generator must give notice to the treatment or storage facility to which the HW is transported if the waste does not meet land disposal treatment standards. 40 C.F.R. § 268.7(a)(1). If the HW does meet land disposal treatment standards, the generator must provide certification of that fact to the TSD facility. 40 C.F.R. § 268.7(a)(2). Land disposal treatment is addressed in two contexts. The first is a concentration limit whereby the HW can be land-disposed as long as the hazardous constituents of concern in the HW are not above the specified concentration limit or the HW has been treated to reduce the concentration of hazardous constituents to below the concentration limit. 40 C.F.R. §§ 268.7, 268.41, 268.43. The second is a waste-specific treatment technology which, if used, allows the HW to be land disposed without regard to any concentration limit. 40 C.F.R. §§ 268.7, 268.42. Generators must retain copies of all land ban notices, certifications, waste analysis data, and other documentation for five years. 40 C.F.R. § 268.7(a)(7).

9. **Generator liability.** A generator, by virtue of having arranged for disposal (intentionally or unintentionally), is strictly liable without regard to fault for cleanup costs and natural resource damages at TSD facilities where the generator's waste was treated, stored, or disposed [CERCLA § 107(a)(3)].

1507 TRANSPORTERS

A. RCRA generally incorporates DOT requirements regarding the regulation of transporters of HW. See 40 C.F.R. Part 263. Except for the RCRA-specific requirements—such as compliance with the manifest system—transporters have minimal regulation under RCRA, but are extensively regulated by the DOT pursuant to 49 U.S.C. §§ 1801 *et seq.* and Title 49 of the C.F.R.

B. Section 3003 of RCRA (42 U.S.C. § 6923) authorizes EPA to regulate RCRA-specific requirements regarding transporter recordkeeping, compliance with the manifest system, and proper labeling of wastes.

C. A transporter can become a generator of HW if he mixes different wastes. 40 C.F.R. § 263.10(c)(2).

D. A transporter must obtain an EPA identification number. 40 C.F.R. § 263.11.

E. A transporter can store HW en route up to ten (10) days at each "transfer facility" (as defined by 40 C.F.R. § 260.10) without becoming a TSD facility. 40 C.F.R. §§ 263.12, 268.50(a)(3). If storage exceeds the ten days at any transfer facility, the transporter becomes the generator and must issue a new manifest and sign and return to the generator its original manifest.

F. A transporter is prohibited from accepting HW from a generator without a properly executed manifest. 40 C.F.R. § 263.20(b). The transporter must ensure that the manifest stays with the shipment to its destination. 40 C.F.R. § 263.20(c). If the transporter delivers the waste to another transporter, each new transporter must sign and date the manifest and leave a copy with the previous transporter. 40 C.F.R. § 263.20(c) and (d). The transporter must deliver the waste to the designated TSD facility on the manifest or to the designated alternate facility in case of an emergency. 40 C.F.R. § 263.21(a). If delivery in accordance with the manifest is not possible, the transporter must contact the generator for instructions on how to proceed. 40 C.F.R. 263.21(b). The transporter is required to keep a copy of the manifest for three years. 40 C.F.R. § 263.22(a).

L. A transporter is liable for transportation related spills and discharges, and is responsible for the cleanup. 40 C.F.R. §§ 263.30, 263.31. For releases at TSD facilities, the transporter is strictly liable only if it selected the facility [CERCLA § 107(a)(4)].

1508 TREATMENT, STORAGE, AND DISPOSAL FACILITIES

A. **Background.** After November 19, 1980, it became illegal to treat, store, or dispose of HW without a permit. Recognizing that existing TSD facilities would need time to upgrade and apply for a permit, existing TSD facilities were "grandfathered" by being given "interim status" under RCRA section 3005(e) (42 U.S.C. § 6925 (e)). The regulations that apply to interim status TSD facilities are at 40 C.F.R. Part 265. All TSD facilities that have interim status must comply with interim status requirements until their Part B permit applications are granted or the facility is "closed" (RCRA closure).

B. **Inactive units.** RCRA regulations do not apply to facilities that have been inactive since November 19, 1980. 45 Fed. Reg. 33,068 (May 19, 1980). However, wastes in place before November 19, 1980, may be subject to RCRA if such wastes in place constitute post-1980 "storage." See, e.g., *Fisher v. Westinghouse*, 690 F. Supp. 442 (M.D. Pa. 1986).

C. **Entities regulated.** RCRA TSD requirements apply to owners or operators of a facility at which HWs are treated, stored, or disposed. RCRA §§ 3004, 3005. 42 U.S.C. §§ 6924, 6925.

1. "Owner" or "operator" is defined as the person who owns the facility, or part of the facility, or the person responsible for the overall operation of the facility. 40 C.F.R. § 260.10.

2. "Facility" is defined as the contiguous land and other structures used for treating, storing, or disposing of HW. 40 C.F.R. § 260.10.

3. "Storage" is defined by RCRA section 1004(33) (42 U.S.C. § 6903(33)) and the regulations (40 C.F.R. § 260.10) to mean the holding of HW for a temporary period at the end of which the HW will be treated, stored, or disposed elsewhere. Indefinite storage is not contemplated. A storage facility indefinitely storing HW would probably be treated as a disposal facility. See, e.g., the definition of "disposal" in RCRA section 1004(3). RCRA land ban regulations limit storage to one year. 40 C.F.R. § 268.50(c).

4. "Treatment" is defined by RCRA section 1004(34) (42 U.S.C. § 6903(34)) and regulation (40 C.F.R. § 260.10) to mean any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any HW so as to neutralize such waste or render it nonhazardous, safer for transport, amenable for recovery or storage, or reduced in volume. This is a very broad definition and includes unintended or ineffective "treatment." Anything that changes the physical, chemical, or biological character or composition of HW is subject to being labeled as treatment. Treatment facilities are also categorized and regulated by type of treatment (e.g., thermal treatment, land treatment, totally enclosed treatment, wastewater treatment unit, chemical / physical / biological treatment facility, and elementary neutralization unit). 40 C.F.R. Parts 264 (permitted facilities) and 265 (interim status facilities) contain both general standards applicable to all TSD facilities (Subparts A-H) and unit-specific standards applicable to the type of treatment facility at issue.

5. "Disposal," as defined under RCRA, is very broad and includes the intentional or unintentional placement of HW into or on any land or water so that the waste or any constituent thereof may enter the environment. RCRA § 1004(3). (42

U.S.C. § 6903)(3)). However, the regulatory definition of "disposal facility" is more narrow in order to focus the regulations on the intended facilities. A disposal facility, as defined by regulation and to which the regulations apply, is a facility or a part of a facility where HW is intentionally placed into or on any land or water and at which the waste will remain after closure. 40 C.F.R. § 260.10. As with treatment facilities, the regulations contain both general standards and unit-specific standards classified by type of disposal [e.g., surface impoundments (264/265, Subpart K), waste piles (264/265, Subpart L), land treatment facilities (264/265, Subpart M), landfills (264/265, Subpart N), and Incinerators (264/265, Subpart O)]. 40 C.F.R. Parts 264 and 265.

C. **Notification requirements.** Pursuant to RCRA section 3010, (42 U.S.C. § 6930) owners and operators of TSD facilities are required to give notice to EPA (or states having an authorized program) of their HW activities. Typically, this is accomplished by obtaining an identification number, filing the Part A and Part B of the permit application, and submitting biennial and other reports.

D. **Interim status facilities.** The following addresses the requirements applicable to interim status facilities in 40 C.F.R. Parts 265 and 270:

1. **How acquired.** Interim status is obtained by filing a notification under RCRA section 3010 and Part A of the permit application. 40 C.F.R. § 270.70. Interim status facilities do not receive a permit or other written authorization to operate, but are subject to the operating requirements in 40 C.F.R. Part 265. See, e.g., *Northside v. Thomas*, 804 F.2d 371 (7th Cir. 1988). TSDs eligible for interim status include those that were (1) in existence on November 19, 1980, or became subject to regulation through a change in the law or regulations, and (2) had not previously been denied a permit or lost interim status. RCRA § 3005(e). 42 U.S.C. § 6925(e). Interim status facilities are subject to losing interim status if the Part B permit application is not filed in a timely manner. See, e.g., RCRA section 3005(e)(2) regarding land disposal facilities.

2. **Applicable standards.** Interim status standards are contained in 40 C.F.R. Part 265 and are self-implementing, requiring no action by EPA to impose them. Most of the standards also do not require retrofitting of existing TSD facilities in order to meet the standards. All interim status TSDs must comply with Subparts B (waste analysis plan, inspection, schedule), D (contingency plan), E (operating record, annual report), F (groundwater monitoring), G (closure plan and post closure care for disposal facilities), and H (financial responsibility). Other Part 265 Subparts address specific types of TSDs [e.g., Subparts I (containers), J (tanks), K (surface impoundments), L (waste piles), M (land treatment), N (landfills), and O (incinerators)].

3. **Newly regulated facilities.** Newly regulated facilities as a result of changes in the law or regulations have six months from the date of publication of the applicable regulations within which to file a Part A application. 40 C.F.R. § 270.10(e). Failure to timely file a complete Part A precludes obtaining interim status; however, EPA believes that it has authority to extend the Part A deadline by means of a RCRA section 3008(a) (42 U.S.C. § 6928(a)) compliance order. 49 Fed. Reg. 17,716, fn.1 (1984) (Apr. 24, 1984). Denials or withdrawals of interim status by EPA is not reviewable by courts. RCRA § 7006(b). *See also Hempstead County v. EPA*, 700 F.2d 459 (8th Cir. 1983) (interim status is not the issuance of a permit giving rise to a right of appeal under section 7006(b) of RCRA regarding the issuance, denial, modification, or revocation of a permit).

4. **Interim status period.** Interim status lasts until EPA or a state acts upon the Part B permit application or interim status is terminated for failure to file a Part B within the time specified or when called for by EPA, failure to provide required information to EPA, or failure to comply with applicable groundwater protection or financial responsibility requirements. RCRA § 3005(e)(2) and (3); (42 U.S.C. § 6925(e)(2) and (3)); and 40 C.F.R. § 270.73. Because of the backlog at EPA and the states in issuing permits, some facilities have been operating under interim status since before November 8, 1984. The regulations provide that, for certain types of such pre-1984 TSD facilities, interim status ended on November 8, 1992, unless a Part B was filed before November 8, 1992. 40 C.F.R. § 270.73(g). TSD facilities that meet the criteria for losing interim status by 1992 because they are still awaiting permit issuance may challenge the loss of interim status and any subsequent enforcement action pursuant to 40 C.F.R. Parts 22 and 124 procedures. *See also* 40 C.F.R. § 270.41. EPA or a state's failure to issue a permit within the time period prescribed by law that results in loss of interim status should be challenged as a denial of a permit with loss of interim status stayed pending final action as provided in 40 C.F.R. § 124.16.

5. **Changes in operations.** Changes in capacity or design at an interim status facility require the submission of a revised Part A and approval before implementing the changes. 40 C.F.R. § 270.72. In addition, enhanced operating standards may also be triggered. RCRA § 3015; 42 U.S.C. § 6936; and 40 C.F.R. § 270.72. If changes in an interim status facility exceed 50% of the capital cost of a comparable new facility, it is considered a new facility and requires a permit to operate. 40 C.F.R. § 270.72(b).

6. **Groundwater protection.** The failure to implement RCRA section 3004 (42 U.S.C. § 6924) groundwater protection requirements may result in the loss of interim status for certain "land disposal" facilities with interim status before November 8, 1984. Land "disposal facilities" are defined as facilities at which HW is intentionally placed into or on the land and will remain after closure. 40 C.F.R. § 270.2. This requirement generally applies to surface impoundments,

landfills, and land treatment units. 40 C.F.R. § 265.90. The owner / operator, to continue under interim status, must have filed a Part B, certified compliance with groundwater monitoring requirements, and met financial responsibility requirements before November 8, 1985. 40 C.F.R. 270.73(c). If the above were not met, the owner / operator must cease operation by November 8, 1985, and meet RCRA closure obligations. Failure to comply with RCRA section 3004 results in automatic loss of interim status. *Vineland v. EPA*, 810 F.2d 402 (3d Cir. 1987).

7. **Closure.** "Closure" is defined as the act of securing hazardous waste management operations at a TSD facility or TSD unit at the facility (partial closure). 40 C.F.R. § 270.2. In practice, it constitutes a site-specific cleanup action carrying the possibility of a facility-wide corrective action program. A TSD facility must have a permit or interim status to operate during its active life. 40 C.F.R. §§ 270.1(c), 270.70(a). "Active life" is defined as the period of time from initial receipt of HW until the facility receives final certification of closure. 40 C.F.R. § 260.10. Thus, the RCRA closure process is the only means to terminate the active life of a TSD facility, including a noncompliant facility that failed to obtain a permit or interim status. General interim status closure requirements applicable to all interim status TSD facilities are contained in 40 C.F.R. Part 265, Subpart G. These requirements include closure and post-closure plans, time allowed for closure, and certification of completion. Additional specific closure requirements for different types of TSD facilities are contained in the different unit-specific Subparts (I-W). Generally, the actual closure process requires the removal or decontamination, in accordance with the closure plan, of all waste residue and the absence of groundwater contamination in order to achieve "clean" closure. If clean closure cannot be achieved, the facility must undergo, in accordance with a post-closure plan, "landfill" ("dirty") closure. Landfill closure typically requires the installation and maintenance of an impermeable cap and groundwater monitoring for the post-closure period (often 30 years). Post-closure requirements for interim status land disposal or treatment units (i.e. any unit closed "dirty") is included in a post-closure permit containing Part 264 post-closure standards for permitted facilities instead of Part 265 standards. 40 C.F.R. § 270.1(c). And, because section 3004(u) of RCRA (42 U.S.C. § 6924(u)) requires corrective action requirements to be included in any RCRA permit, facility-wide RCRA corrective action will also likely be included in the post-closure permit.

8. **Corrective action.** Section 3008(h) of RCRA (42 U.S.C. § 6928(h)) authorizes the EPA Administrator to issue corrective action orders to interim status facilities when it is determined there has been a release of HW into the environment and some action is necessary to protect human health and the environment. "Release" is not defined under RCRA, rather the CERCLA section 101(22) (42 U.S.C. § 9601 (22)) definition is used. Section 3008(h) orders must state with reasonable specificity the nature of the corrective action and specify a time for compliance. An agency hearing is available in accordance with 40 C.F.R. Part 24 and, for private parties, the order is reviewable in Federal court pursuant to RCRA section

7006(b). (42 U.S.C. § 6976(b)) 53 Fed. Reg. 12,556, 12,563 (1988) (Apr. 23, 1988). EPA can bring a civil action against private parties for injunctive relief, sanctions, and civil penalties for failure to comply with a section 3008(h) order. EPA can issue section 3008(h) orders to Federal facilities on the basis that corrective action is a precondition to obtaining a permit and the RCRA waiver of sovereign immunity subjects the Federal Government to permitting requirements. (DOJ interpretation of RCRA section 6001 (42 U.S.C. § 6961).) EPA's authority to require corrective action is based almost entirely on RCRA statutory provisions. [RCRA §§ 3008(h) (interim status facilities) and 3004(u) and (v) (permitted facilities)]. The only regulatory authority for corrective action is in 40 C.F.R. Part 264, Subpart F, and applies only to releases to groundwater from units with a permit or post-closure permit.

9. **Corrective action process.** Unlike the CERCLA process set forth in the National Contingency Plan (40 C.F.R. Part 300), the RCRA corrective action process is a product of EPA guidance made effective through the issuance of section 3008(h) orders and corrective action permits. Corrective action regulations have been proposed, but not finalized. See 55 Fed. Reg. 30,798 (1990) (July 27, 1990). The following describes the major elements of the RCRA corrective action process and identifies the CERCLA process counterpart:

a. **RCRA facility assessment (RFA).** The purpose of the RFA is to gather information on all actual or potential releases and determine the need for an investigation. It is a prerequisite to obtaining an operating permit or post-closure permit and is similar to a CERCLA Preliminary Assessment / Site Investigation (PA / SI).

b. **Interim measures (IM).** The IM constitutes steps taken to immediately abate problems and keep existing problems from worsening. It is similar to the CERCLA removal action or interim remedial action.

c. **RCRA facility investigation (RFI).** The RFI consists of studies to fully characterize the nature, extent, and rate of migration of the release. It is similar to the CERCLA remedial investigation (RI).

d. **Corrective measures study (CMS).** The purpose of the CMS is to develop and evaluate corrective action alternatives and recommend appropriate corrective action measures. This is similar to the CERCLA feasibility study (FS).

e. **Remedy Selection.** Remedy selection is accomplished through the RCRA procedures contained in the 3008(h) order. Such procedures will likely include amending the 3008(h) order to incorporate the remedy or negotiating a separate agreement addressing the remedy. An opportunity for public comment

will also likely be included. (Note that remedy selection for RCRA section 3004(u) corrective action will be accomplished through a modification to the permit and the procedures for permit modification.) CERCLA remedy selection is accomplished through the issuance of a record of decision (ROD).

f. **Corrective measures implementation (CMI).** The CMI entails the design, construction, operation, maintenance, and monitoring of the corrective action selected. This is similar to the CERCLA remedial design / remedial action (RD / RA) and long-term maintenance and monitoring.

F. **Permitted TSD facilities.** The following identifies the TSD facilities that must obtain permits and addresses the requirements for TSD facilities with permits:

1. **TSD facilities.** As stated above, facilities that engage in the treatment, storage, or disposal of HW as defined by RCRA require a permit to operate. This includes, eventually, interim status TSD facilities unless closed under RCRA closure procedures prior to permit issuance. It also includes "new" TSD facilities. New TSD facilities that are ready to begin operation, or where physical construction is ready to begin, after the effective date of Part 264 standards for the class of facilities to which the facility belongs must, before such operation or physical construction commences (whichever is earlier), have submitted both a Part A and Part B and received a final effective RCRA permit. 40 C.F.R. § 270.10(f). Note also that new facilities must be designed and built in accordance with applicable standards in Parts 264 and 267, and in contemplation of meeting permit prerequisites in Part 270.

2. **Permit requirements.** Requirements for permitted TSD facilities are contained in 40 C.F.R. Part 264. Part 264 is structured in the same manner as Part 265 for interim status facilities. Subparts A-H contain general operating requirements applicable to all permitted TSD facilities with the remaining Subparts addressing specific types of TSD facilities. The compliance with the applicable requirements in Part 264 will likely be included as a permit condition such that noncompliance constitutes a permit violation. The general requirements in Subparts A-H include: obtaining an identification number (§ 264.11), performing waste analysis (§ 264.13(a)), maintaining proper security (§ 264.14), conducting periodic inspections (§ 264.15), holding personnel training (§ 264.16), ensuring special protection to prevent accidental ignition or reaction of wastes (§ 264.17), maintaining emergency preparedness procedures (§§ 264.31-37), compliance with the manifest system (§§ 264.71-72), and recordkeeping and reporting requirements (§§ 264.73-77).

3. **Groundwater protection.** Surface impoundments, waste piles, land treatment units, and landfills are required to comply with 40 C.F.R. Part 264, Subpart F, groundwater protection requirements. 40 C.F.R. § 264.90(a).

Groundwater protection consists of detection monitoring, compliance monitoring, and corrective action. Detection monitoring is intended to monitor for releases to groundwater from the specific unit. 40 C.F.R. §§ 264.97-98. Compliance monitoring in accordance with section 264.99 is required if detection monitoring reveals statistically significant evidence of contamination. 40 C.F.R. § 264.91(a)(1). Corrective action under section 264.100 is required whenever the groundwater protection standard is exceeded. 40 C.F.R. § 264.91(a)(2). The permits for facilities at which groundwater has been contaminated must contain conditions that (1) identify the locations at which groundwater monitoring is to be performed; (2) identify the hazardous constituents to be monitored; and (3) identify a groundwater protection standard in terms of either a maximum concentration limit (MCL) or alternative concentration limit (ACL). 40 C.F.R §§ 264.90-94.

4. **Closure.** As discussed in section 1508.D.7, above, for interim status facilities, closure is also required to terminate the active life of a permitted TSD facility. The closure process for permitted facilities is essentially identical to the process for interim status facilities such that the discussion in 1508.D.7 applies here as well. The important difference is that the closure standards for permitted TSD facilities are in Part 264 and are typically incorporated as permit conditions. Similar to the structure of Part 265, general closure requirements are contained in Part 264, Subpart G. Closure requirements for specific types of TSD facilities are contained in the facility specific subparts (I-X) of Part 264.

5. **Corrective action.** As stated in 3 above, corrective action for groundwater contamination is to be included as a permit condition for TSD units subject to such requirements if groundwater monitoring shows that compliance levels are exceeded or any relevant hazardous constituents were found to exceed concentration limits. 40 C.F.R. § 264.91(a). The permit is to identify the nature, scope, and duration of corrective action required. 40 C.F.R. § 264.100. This element of the RCRA corrective action program addresses only groundwater contamination from TSD units subject to Part 264, Subpart F, requirements. The much broader corrective action requirements are contained in RCRA sections 3004(u) and (v). (42 U.S.C. § 6924(u) and (v)). RCRA section 3004(u) requires RCRA permit applicants to undertake corrective action to address environmental contamination caused by release of HW or hazardous constituents from any solid waste management unit at a TSD facility regardless of the time at which the waste was placed in the unit. Section 3004(v) of RCRA requires permit applicants to undertake corrective action for releases of HW that have migrated off the facility boundary. Unlike the CERCLA National Contingency Plan, 40 C.F.R. Part 300, RCRA regulations do not address corrective action nor the corrective action process in any detail. See, e.g., 40 C.F.R. § 264.101, which restates the RCRA statutory corrective action obligation. Comprehensive RCRA corrective action regulations have been proposed, but not yet finalized. 55 Fed. Reg. 30,798 (1990) (July 27, 1990). As such, the EPA corrective

action process has developed as EPA guidance and enforced as a permit condition. See 1508.D.9, above, for a description of the corrective action process.

1509 FEDERAL FACILITY COMPLIANCE ACT AMENDMENTS. The Federal Facility Compliance Act (FFCA), Pub. L. No. 102-386, was passed on October 6, 1992. Although most noted for waiving sovereign immunity from fines and penalties under RCRA, it also contained certain substantive amendments applicable to Federal facilities. The purpose of the amendments was to address issues specifically affecting Federal facility compliance with RCRA. The following addresses each of the four amendments.

A. **Mixed waste.** The FFCA added a definition to RCRA defining "mixed waste" as waste containing both HW and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* RCRA § 1004(41) (42 U.S.C. § 6902(41)). Mixed waste has been primarily a Department of Energy (DOE) RCRA problem. The DOE has been unable to dispose of mixed waste because technology has not been available to pretreat mixed waste to RCRA land ban standards. Thus, DOE has been storing such waste in excess of the one year HW storage limitation in 40 C.F.R. § 268.50(b). The FFCA added language to section 6001 of RCRA (42 U.S.C. § 6961) that: (1) the waiver of sovereign immunity for fines and penalties does not apply to the storage of mixed waste by any Federal agency for three years from enactment of the FFCA; and (2) after the three years, the waiver will not apply to DOE's storage of mixed waste if DOE is in compliance with the plan and compliance order required by RCRA § 3021(b) regarding the storage of mixed waste. The FFCA also added new RCRA section 3021 that requires DOE to perform an inventory of its mixed waste in storage, prepare a plan to develop mixed waste treatment capacities and technologies, obtain approval of the plan by EPA or a state, and enter a compliance agreement with EPA or a state requiring compliance with the plan. RCRA § 3021.

B. **Public vessels.** The FFCA added new RCRA section 3022 addressing when RCRA applies to HW on public vessels, i.e., vessels owned or bareboat chartered and operated by the United States or by a foreign nation, except when the vessel is engaged in commerce. It provides that HW generated on a public vessel shall not be subject to RCRA storage, manifest, inspection, or recordkeeping requirements until the HW is transferred to a shore facility. The only exceptions where RCRA would apply are if waste is stored for more than 90 days after the public vessel is placed in reserve or is otherwise no longer in service, or waste is transferred to another public vessel within U.S. territorial waters and stored more than 90 days after transfer to that other public vessel. Section 3022 incorporates the definitions of "in reserve" and "in service" in 10 U.S.C. §§ 7293, 7304-08. "In reserve" and "no longer in service" should be interpreted, consistent with 10 U.S.C. § 7293, as not in commission or when moved to an inactive ships facility. However, note the language in the FFCA

Conference Report that such terms include periods when the vessel is "inactive for . . . any significant period of time." 138 Cong. Rec. H8867 (daily ed. Sept. 22, 1992).

C. **Munitions.** The FFCA amended RCRA section 3004 (42 U.S.C. § 6924) by adding new subsection (y) requiring EPA, in consultation with DOD, to promulgate regulations identifying when chemical and conventional munitions become HW and establishing requirements for safe storage and transportation of such "HW." Proposed regulations are due to be promulgated shortly and, although not within the charter of RCRA section 3004(y), will likely also address the application of RCRA to ordnance ranges.

D. **FOTWs.** The FFCA added new RCRA section 3023 which provides federally owned treatment works (FOTWs) (sewage plants) a conditional RCRA exemption similar to the domestic sewage exclusion available to publicly owned treatment works (POTWs). The problem has been (and may continue to be) that some FOTWs (the same as POTWs), in addition to receiving domestic sewage, received industrial wastes that were HW, or the treatment of which produced sludges that were HW. Because these FOTWs did not have a RCRA permit, they were deemed an unpermitted RCRA TSD facility and required to undergo RCRA closure. POTWs, because of the domestic sewage exclusion, are exempt from RCRA because their wastewaters and any wastes contained therein are excluded from the definition of solid waste. 40 C.F.R. § 261.4(a)(1). The statutory basis for the domestic sewage exclusion is in RCRA section 1004(27), (42 U.S.C. § 6903(27)) the definition of "solid waste," which excludes "solid or dissolved materials in domestic sewage." New RCRA section 3023 amends the statutory "solid waste" definition by providing that the phrase "solid or dissolved materials in domestic sewage" includes any solid or dissolved material introduced to a FOTW if *one* of four specified conditions is met (hence, a "conditional exemption"). The four conditions are: (1) the industrial wastewater stream is subject to, and pretreated in accordance with, a Clean Water Act (CWA) pretreatment standard issued pursuant to CWA section 307; (2) if no CWA pretreatment standard exists, EPA has issued a schedule for promulgating a standard for the wastewater stream within seven years; (3) if neither of the first two apply, the wastewater has been pretreated to RCRA land ban standards; or (4) the waste is from a household or small quantity generator (less than 100 kg/mo). Failure to meet one of the four conditions may result in the FOTW having to undergo RCRA closure. Section 3023 limits the definition of FOTW to sewage plants that are owned and operated by the Federal Government, have a CWA section 402 permit, and that treats wastewater the majority of which is domestic sewage. Thus, industrial wastewater treatment plants are not included. The Navy has inventoried its industrial wastewater streams to determine which have or require a CWA section 307 pretreatment standard. The results show that only solvents are not presently covered by a 307 pretreatment standard, but they are expected to be addressed by EPA as part of the pretreatment standard for transportation vehicles currently being developed.

1510 AUTHORIZED STATE PROGRAMS. RCRA section 3006 (42 U.S.C. § 6926) allows states to seek authorization from EPA to administer the HW program in the state. To qualify for authorization, a state HW program must be equivalent to, and consistent with, the Federal program and provide for adequate enforcement. RCRA § 3006(b). 40 C.F.R. Part 271 contains the specific requirements a state must meet to obtain authorization. 40 C.F.R. Part 272 identifies the states that have obtained authorization, but it is recommended that the Federal Register be checked or the EPA Region consulted to obtain the latest status of a state HW program. States typically acquire authorization in stages: first obtaining authorization for the HW management portion of the program and later obtaining corrective action authority. In a state with an authorized program, state HW laws apply in lieu of RCRA. RCRA § 3006(b). The net effect is that: (1) in states with a fully authorized HW program, only state HW laws apply; (2) in states with a partially authorized program, state law applies for the authorized portion and both state law and RCRA apply for the unauthorized portion; and (3) in states without an authorized program, both RCRA and state HW laws apply. *See, e.g.,* 40 C.F.R. §§ 264.1(f), 265.1(b)(4). After EPA authorization is obtained, state law governs in any enforcement action whether brought by the state or EPA. 40 C.F.R. § 271.3(b). RCRA section 3008(a)(1) and (2) (42 U.S.C. § 6928(a)(1) and (2)) give EPA authority to enforce a state law in a state with an authorized program. *See also Wyckoff v. EPA*, 796 F.2d 1197 (9th Cir. 1986). The authority in section 3008(a) to enforce "any requirement of this subchapter" is viewed by EPA as including a state HW program authorized pursuant to section 3006 of the same subchapter (i.e. RCRA Subtitle C). However, EPA authority to enforce state law is limited to only that portion of state law that is authorized. Any portion of state HW law that exceeds the scope of RCRA (e.g., regulates HW not regulated by RCRA), even in a fully authorized state, is not part of the authorized program. 40 C.F.R. § 271.1(i)(2).

1511 ENFORCEMENT

A. **Cross references.** This section should be read in conjunction with Chapter 2, *Federal Agencies As Regulated Entities*, and Chapter 3, *Federal Facility Compliance*.

B. **Sovereign immunity and Federal supremacy.** The FFCA waived sovereign immunity from monetary fines and penalties for violations of RCRA and state or local HW laws. It is not a prerequisite that the state have an authorized HW program to assess fines or penalties. The only limitation is that the state use the fines or penalties for environmental purposes. *See* RCRA Section 6001 (42 U.S.C. § 6961) and the chapters referenced in 1511.A above. The FFCA also amended the RCRA definition of "person" to include the Federal Government. RCRA § 1004(15) (42 U.S.C. § 6903(15)). Consequently, all requirements of RCRA applicable to any other "person" are applicable to the Federal Government unless a specific exemption

exists. Prior to the FFCA, the RCRA waiver provision in section 6001 dictated the scope of the Federal Government's obligation to comply with RCRA. Section 6001 of RCRA provides generally that the Federal Government is obligated to comply with all Federal, state, interstate, and local requirements — both substantive and procedural — respecting the control and abatement of solid waste or hazardous waste disposal and management. Although this provision, because of the amended definition of "person," no longer governs the scope of our obligation to comply with RCRA, it still determines the scope of our obligation to comply with state or local HW requirements. In determining whether a state or local requirement applies, it is necessary to determine first whether the requirement applies to us as a matter of state or local law (e.g., are we a "person" under such law and does the law, by its terms, apply the requirement to the Federal Government), and second, if the requirement does apply as a matter of state or local law, is the requirement within the universe of requirements specified in RCRA section 6001. "Requirements" are considered to be objective, predetermined standards capable of uniform application [*New York v. United States*, 620 F.Supp. 374 (E.D.N.Y. 1985)], and, for purposes of section 6001, must relate substantively or procedurally to the control and abatement of solid waste or hazardous waste disposal and management. *See also U.S. Dep't of Energy v. Ohio*, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992) and discussion of "requirements" (i.e. substantive requirements and the means to implement them).

C. **Administrative enforcement.** The following addresses the types of administrative enforcement actions available under RCRA. Although state HW laws likely provide the same or similar actions, state laws may vary and should be reviewed as to what enforcement options and procedures exist.

1. **RCRA section 3008(a) (42 U.S.C. § 6928(a)).** Section 3008(a) authorizes EPA to issue an order assessing a civil penalty for past or present violations of Subtitle C of RCRA. Section 3008(g) provides for a penalty of up to \$25,000.00 per day per violation. Section 3008(a) is EPA's primary enforcement authority. Administrative hearings are available to contest the violations in accordance with 40 C.F.R. Part 22 procedures. *See also* 58 Fed. Reg. 49,044 (1993) (Sept. 21, 1993) regarding the administrative enforcement procedures used for Federal facilities in light of the FFCA.

2. **RCRA section 3008(h).** As discussed above, EPA may issue corrective action orders to interim status TSD facilities, including Federal TSD facilities, pursuant to RCRA section 3008(h). Section 3008(h)(2) authorizes EPA to assess a penalty of up to \$25,000.00 per day for each day of noncompliance with the order. The 3008(h) order may be challenged pursuant to the procedures in 40 C.F.R. Part 24. Although a 3008(h) order will likely contain provisions for stipulated penalties and dispute resolution such that the following may be a moot issue, it is unclear how violations of a 3008(h) order after it is final are addressed. Part 24 procedures apply to issuance of the order and penalties under section 3008(h)(2) apply

to persons who fail to comply with the order in its entirety. Violations resulting from failing to meet the terms of the order after it is final (e.g., late submission of documents) are also likely addressed through Part 24 procedures, but review section 3008(a) and Part 22 procedures. The EPA enforcement guidance cited above did not address 3008(h) orders and none have been issued since passage of the FFCA.

3. **RCRA sections 3005 and 7006(b) (42 U.S.C. §§ 6925 and 6976(b)).** These sections address the issuance of permits and the ability to obtain judicial review of certain permit actions by EPA. Although Federal agencies cannot obtain judicial review of EPA's permit actions, administrative review is available through 40 C.F.R. Part 124 procedures. Under Part 124, the ability exists to obtain review of issues involving permit issuance (including objectionable permit conditions), denial, modification, or revocation. Permit violations after issuance are handled in accordance with section 3008(a) and Part 22 procedures.

4. **RCRA section 7003 (42 U.S.C. § 6973).** Under RCRA section 7003, EPA has authority, similar to its CERCLA authority under CERCLA section 106, to issue cleanup orders to any past or present generator, past or present transporter, or past or present owner or operator of a TSD facility who has contributed to the handling of HW or solid waste at the location at issue to take such action as necessary to abate an imminent and substantial endangerment. Section 7003(b) authorizes EPA to assess a penalty of \$5,000.00 per day against any person who willfully violates, or fails or refuses to comply with, the order. Neither 40 C.F.R. Part 22 nor Part 24 hearing procedures address section 7003 orders. Note also that compliance with RCRA is not a defense. The issues are whether (1) there is an imminent and substantial endangerment; (2) the requisite section 7003 HW or solid waste activities are involved; and (3) the Federal facility is within the class of persons to whom the 7003 order can be issued.

5. **RCRA section 3013 (42 U.S.C. § 6934).** Section 3013 gives EPA authority to issue orders to past or present owners or operators of a site to perform such monitoring, testing, analysis, and reporting EPA deems reasonable to ascertain the nature and extent of any hazard that may present a substantial hazard to human health or the environment. Section 3013(e) suggests that EPA's sole recourse to enforce the order is to initiate a civil proceeding in Federal district court. Penalties up to \$5,000.00 per day may be assessed by the court for noncompliance.

D. **Civil enforcement actions.** The following addresses the civil enforcement actions that can be brought in court against Federal facilities. Because EPA cannot take civil judicial action against a Federal facility under the doctrines of unitary executive and no case or controversy (see Chapter 2), EPA judicial enforcement is not addressed.

1. **State civil actions.** Although EPA cannot bring civil enforcement actions against Federal facilities, states are able to do so either pursuant to state HW laws or a RCRA citizen suit as discussed below. Typically, however, states choose to exercise administrative enforcement authority rather than initiate judicial enforcement action. By the same token, Federal agencies can obtain judicial review of a state enforcement action. State enforcement proceedings generally allow for judicial review in state court after completion of the administrative process. If a state enforcement action is brought, the matter should be coordinated with REC counsel both before proceeding with a state administrative hearing and whether the matter should be brought for judicial review.

2. **Citizen suits.** RCRA section 7002 (42 U.S.C. § 6972) provides for citizen suit enforcement against any person, including the Federal Government, alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which is effective pursuant to RCRA (i.e. Federal RCRA or authorized state HW law). RCRA § 7002(a)(1)(A). Notice of the proposed citizen suit must be given to EPA, the state, and the party against whom the action is brought 60 days before bringing the action. However, the citizen suit may be brought immediately after notice is given if RCRA Subtitle C (HW) violations are involved. RCRA § 7002(b)(1)(A). Providing notice is a jurisdictional prerequisite to bringing the citizen suit. A citizen suit cannot be brought on compliance matters being diligently prosecuted by EPA or the state. RCRA § 7002(b)(1)(B). Citizen suits can also be brought against present and past contributors to a TSD facility where an imminent and substantial endangerment exists. RCRA § 7002(a)(1)(B). This action requires 90-day notice. RCRA § 7002(b)(2)(A). The citizen suit cannot be brought if a RCRA 7003 (42 U.S.C. § 6973) order has been issued or a CERCLA removal action or remedial investigation / feasibility study is underway. RCRA § 7002(b)(2)(B). The action is to be brought in district court where the alleged violations occurred or endangerment exists. The court is authorized to issue any orders or injunctive relief necessary as well as assess civil penalties. RCRA § 7002(a). The prevailing party in a citizen suit may recover costs of litigation, including attorneys fees and expert witness fees, at the discretion of the court. RCRA § 7002(e).

E. **Criminal penalties.** The following addresses criminal penalties under RCRA.

1. **Authority.** Criminal sanctions are available against any person who knowingly violates RCRA HW requirements, including enhanced criminal penalties for knowingly endangering another person. RCRA §§ 3008(d) and (e); 42 U.S.C. § 6928(d) and (e). RCRA section 3008(f) contains special rules regarding elements of proof to establish knowledge. Generally, a criminal offense simply requires knowledge of the act, not knowledge that the waste was hazardous.

2. **Federal Government.** The Federal Government is immune from criminal penalties under RCRA. RCRA § 6001(a) (42 U.S.C. § 6961(a)).

3. **Federal officers, agents, employees.** Federal officials are subject to any criminal sanction under any Federal or state HW law. However, Federal officials acting within the scope of their duties have been held to be immune from criminal enforcement under RCRA. *California v. Walters*, 751 F.2d 977 (9th Cir. 1984).

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APPENDIX A**DEFENSE REUTILIZATION AND MARKETING SERVICE**

This Appendix addresses the role of the Defense Reutilization and Marketing Service (DRMS) in disposing of solid and hazardous waste. It is not so much a discussion of legal issues as it is a practical guide to dealing with DRMS.

I. REFERENCES

- A. Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471
- B. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*
- C. 40 C.F.R. Parts 124, 260-72
- D. DOD 4160.21-M, *Defense Reutilization and Marketing Manual*
- E. DRMS-H 4160.3, *Disposal Operating Procedures*
- F. OPNAVINST 5090.1A, Ch. 10
- G. 10 U.S.C. § 2577, Disposal of Recyclable Materials
- H. 32 C.F.R. Part 172, Disposition of Proceeds from DOD Sales of Surplus Property
- I. DUSD(ES) Memo 28 September 1993, Subj: POLICY FOR DOD RECYCLING

II. OVERVIEW. The DRMS was established in 1972 as the primary field level activity of the Defense Logistics Agency (DLA). The mission of the DRMS includes the reutilization of serviceable excess personal property, marketing of surplus personal property and scrap, precious metals recovery, and management and disposal of hazardous waste. For our purposes, the key feature of the DRMS is its role in the disposal of hazardous waste.

III. DRMS ORGANIZATION. The top of the DRMS pyramid is the headquarters office in Battle Creek, Michigan. The five regional offices are located in Memphis, Tennessee; Honolulu, Hawaii; Columbus, Ohio; Ogden, Utah; and Wiesbaden, Germany. The base is rounded out by the 170 Defense Reutilization and Marketing Offices (DRMOs) in the United States and the 43 overseas.

IV. HAZARDOUS PROPERTY MANAGEMENT. Under DRMS jargon, hazardous property includes hazardous waste and hazardous material. Hazardous waste is waste regulated by RCRA or state RCRA statutes. Hazardous material is all other hazardous property regulated by the Occupational Health and Safety Administration (OSHA) and the Department of Transportation (DOT).

A. **Exclusions.** DRMS does not dispose of all DOD-generated hazardous property. Each service is responsible for disposal of certain hazardous property including: chemical warfare materials, ammunition, and ordnance; controlled medical items; municipal garbage; and sludge from wastewater treatment facilities. A complete list of excluded hazardous property is listed in DOD 4160.21-M, Chapter IX, enclosure 8.

B. **Reutilization.** DRMS makes every reasonable effort to reutilize the hazardous material it receives. If reutilization within DOD cannot be accomplished, transfer or donation outside DOD is attempted. If those efforts are unsuccessful, DRMS markets the material for sale. If it cannot be sold, the material is disposed of as a hazardous waste.

C. **Sale of hazardous material.** Evolving liability concepts have required DRMS to tighten their sales practices significantly in recent years.

1. **The "Tylenol-seal" concept.** DRMS will not sell hazardous material unless it is unused and unopened. The container must be free from dents and rust, properly labeled. The sale must be consistent with the product's shelf-life specifications. If any criterion is not met, the material will be disposed of as a hazardous waste.

2. **The right buyer.** DRMS checks out the buyer carefully to avoid liability as a potentially responsible party (PRP) if the buyer does not handle the material properly. Other regulatory agencies are contacted for information regarding the buyer's environmental responsibility. The buyer must provide a "statement of intent" certifying the intended use of the purchased material. Post-award inspections are made on a random basis to ensure proper handling of the hazardous material.

3. **Management.** Sales are coordinated by the National Sales Office in Memphis to centralize the sale of all hazardous material and to facilitate policy implementation. Hazardous material is no longer sold at local DRMOs. Records on sales are kept for 50 years. Buyers determined to be irresponsible with regard to management of hazardous materials are barred from making future purchases.

D. **Disposal.** The management practices specified above are reducing hazardous materials sales. Consequently, more is being disposed as hazardous waste. Disposal is expensive. As of October 1, 1991, the military services have to pay for the disposal of hazardous materials which cannot be sold.

V. DRMO OPERATION

A. **Responsibilities.** The installation commander is the "owner" of the RCRA permit and reports to EPA and state authorities. Typically, the DRMO is the "operator" of the storage facility, reporting to the installation commander and the DRM Region. DRMOs operating under interim status (Part A) permits or approved Part B permits comply with 40 C.F.R. § 264 or § 265 respectively.

B. **Turn-in requirements.** As an operator of a permitted TSD, the DRMO must operate in compliance with EPA, state, and DOD regulations. To that end, DRMO requires generators to comply with requirements of 40 C.F.R. § 262 which include:

1. Hazardous waste determinations under section 262.11 (DRMS is *not* responsible for managing installation hazardous waste prior to turn-in; waste identification is the sole responsibility of the generator);
2. proper manifesting under Subpart B;
3. pretransport requirements under Subpart C, relating to packaging, marking, labeling, placarding, and accumulation time; and
4. recordkeeping and reporting under Subpart D.

C. **Hazardous waste disposal contracting.** DRMS runs a centralized contracting system. All hazardous waste disposal contracts are awarded at DRMS headquarters in Battle Creek, Michigan. Hazardous waste disposal contracts are administered at the regional level in Ogden, Memphis, and Columbus. Each region has a legal office dedicated to supporting the contract administration function. When hazardous waste is turned in to the DRMO by the military services, DRMS issues a delivery order under the contract for the removal and disposal of the waste.

Typically, contractors have 30 days from the date of the delivery order to remove the waste.

VI. RECYCLING

A. ***Installation recycling programs.*** 10 U.S.C. § 2577 authorizes Federal installations to establish recycling programs and to use the net proceeds for installation environmental projects MWR purposes. 32 C.F.R. Part 172 identifies the recyclable materials that are eligible for the program and describes how proceeds are to be distributed. Implementing policy guidance is contained in the DOD Recycling Policy issued by Deputy Under Secretary of Defense (Environmental Security) DUSD(ES) on September 28, 1993.

CHAPTER XVI**UNDERGROUND STORAGE TANKS (USTs)****1601 REFERENCES**

- A. The Resource Conservation and Recovery Act (RCRA), Subtitle I, 42 U.S.C. §§ 6991 - 6991i
- B. EPA UST Regulations, 40 C.F.R. Part 280
- C. Approval of State UST Programs, 40 C.F.R. Part 281
- D. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 14
- E. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 13

1602 UNDERGROUND STORAGE TANK (UST) DEFINED

- A. Generally, a tank is an "underground storage tank" if:
 - 1. It is used to contain an accumulation of "regulated substances;"
 - and
 - 2. at least 10 percent of its volume, including piping, is beneath the ground.
- B. "Regulated substances" broadly defined at 40 C.F.R. § 280.12 include petroleum, and any "hazardous substance" as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at 42 U.S.C. § 9601(14). "Regulated substances" does not include hazardous wastes which are regulated under subchapter III of RCRA (42 U.S.C. §§ 6921-6939).

C. The term UST does *not* include:

1. Residential tanks of 1,100 gallons or less used to store motor fuel for noncommercial purposes;
2. tanks used for storing heating oil for use on the premises;
3. septic tanks;
4. wastewater treatment tanks subject to Clean Water Act Regulation;
5. tanks whose capacity does not exceed 110 gallons;
6. tanks which contain a de minimis concentration of regulated substances; and
7. other tanks excluded under 42 U.S.C. § 6991 or 40 C.F.R. § 280.10.

D. The UST program, by tightly regulating subsurface tanks and piping, indirectly encourages the use and construction of above-ground tanks so that leaks are more readily detectable and promptly remedied, thereby reducing threats to drinking water supplies.

1603 NOTIFICATION REQUIREMENTS

A. As of November 8, 1984, UST owners had 18 months to notify EPA or the local state of the age, size, type, location, and uses of their tanks. EPA approved state programs are found at 40 C.F.R. Part 282, Subpart B.

B. As of November 8, 1984, an owner of a UST taken out of operation after January 1, 1974 had 18 months to notify the state of the date the UST was taken out of operation, its age then, size, type, location, and type and quantity of substances left stored in the tank on the date it was taken out of operation. No reporting requirement exists for USTs taken out of operation before January 1, 1974.

C. After the initial notice period, any owner who begins using a UST has 30 days to notify the state of the UST's age, size, type, location, and uses.

1604 TECHNICAL STANDARDS

A. **New USTs.** To prevent releases due to structural failure, corrosion, or spills and overfills, new tanks and piping systems must be properly designed and constructed. New USTs must also be corrosion proof (cathodic protection). Standards are specified in 40 C.F.R. § 280.20.

B. **Existing USTs.** By December 22, 1998, all existing UST systems which do not meet the standards for new USTs must be upgraded or closed. Upgrading methods in 40 C.F.R. § 280.21, include interior lining, cathodic protection, or internal lining combined with cathodic protection. Closure requirements are listed in 40 C.F.R. §§ 280.70, *et seq.* Corrective action, under 40 C.F.R. §§ 280.60, *et seq.*, must be undertaken at closed USTs according to 40 C.F.R. §§ 280.72, *et seq.*, if there is evidence of past leakage.

1605 RELEASES

A. **Prevention.** Owners and operators must ensure that spills and overfills do not occur. The regulations impose various testing and inspection requirements to ensure that releases do not occur due to corrosion. For example, the cathodic protection for steel tanks must be tested every six months and inspected per industry standards. USTs must be repaired as necessary to prevent releases.

B. **Leak detection.** All owners and operators of UST systems must provide a method for release detection. Owners and operators of USTs must report to the state the discovery of a release, unusual operating conditions, or monitoring results from a release detection system indicating that a release has occurred, within 24 hours.

C. **Confirmation.** Unless corrective action is begun, owners and operators must immediately investigate and confirm all suspected releases within 7 days.

D. **Cleanup.** Owners and operators must immediately contain and clean up any spill or overfill. Corrective action, however, must be implemented for:

1. Spills or overfills of petroleum resulting in a release to the environment in excess of 25 gallons; or

2. spills or overfills of hazardous substances resulting in a release to the environment in quantities reportable under CERCLA.

E. **Corrective action and closure.** Confirmed releases must be addressed per 40 C.F.R. §§ 280.60, *et seq.* These requirements include: initial response to

prevent further release and abate what has been released, initiate data collection for site characterization purposes, free product removal, investigations for soil and groundwater cleanup, preparation of corrective action plan and cleanup, and public participation.

F. **Temporary closure.** If a UST is to be closed for less than three months, the owner must continue corrosion protection and leak detection. Leak detection is not required if tank is emptied. "Empty" means no more than one inch of residue, or 0.3 percent by weight of the UST's capacity remains in the system. If the UST is to be closed for 3 to 12 months, the owner must leave vent lines open and functioning, all other lines will be capped and secured. A UST to be closed for more than 12 months must comply with the rules for permanent closure unless it meets the new tank standards or the upgrading requirements. 40 C.F.R. § 280.70.

G. **Permanent closure or change in service.** Owners must give 30 days' notice before permanently closing a UST or implementing a change in service. First, the owner must empty and clean the UST, removing all liquids and accumulated sludge. Then, the owner must perform a site assessment to determine whether a release has occurred. If a release is detected, corrective action must be implemented. Closure can be ordered for tanks that had been closed prior to December 22, 1988, if releases pose a current threat to the environment. 40 C.F.R. § 280.71.

H. **Reporting and recordkeeping.** Owners' and operators' reporting requirements include: notification of UST systems, reports of releases or suspected releases, corrective action planned or taken, and notification of closure. Recordkeeping requirements include: maintaining corrosion analysis reports, records of release detection inspections, and documentation of repairs. 40 C.F.R. § 280.34.

1606 ENFORCEMENT

A. **Sovereign immunity.** Under the waiver of sovereign immunity in 42 U.S.C. § 6991f, federal facilities are subject to the federal, state, and local substantive and procedural requirements applicable to USTs in the same manner and same extent as any other person, including the payment of reasonable service charges. Federal facilities are not immune from any process or sanction to enforce injunctive relief. However, no waiver of sovereign immunity exists for the payment of criminal fines or civil penalties.

B. **Inspections.** When OPNAVINST 5090.1A was distributed in 1990, an Environmental and Natural Resources Program Checklist was provided as enclosure (2). The section on USTs thoroughly lists the requirements for USTs. Performing self-audits using this checklist and following up with appropriate action is excellent preventive medicine. Because most states have authority and control of UST

programs, pursuant to 42 U.S.C. § 6991g, activities could benefit from securing a copy of the local state inspector's checklist and utilizing it in a self-audit.

1607 ADDITIONAL INFORMATION

A. Chief of Naval Operations (CNO) Memo, Revisions to Funding Guidance for Environmental Requirements for Underground Storage Tank Projects, Ser 453/1U600253 dtd 23 Sep 91, provides guidance on seeking funds for UST work.

B. EPA has an Office of Underground Storage Tanks (OUST) at 11029 Kenwood Road, Cincinnati, OH 45268. Most regions also have an OUST. Either through those contacts or through the EPA regional library, Navy attorneys usually are provided materials at no cost. EPA brochure 510-B-93-003 of March 1993, "Information on Ordering Underground Storage Tank Materials," provides a four-page list of what EPA presently has available on the subject.

CHAPTER XVII**EMERGENCY PLANNING &
COMMUNITY RIGHT-TO-KNOW ACT
AND
POLLUTION PREVENTION ACT (EPCRA)****1701 REFERENCES**

- A. Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 11001 *et seq.*
- B. Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101 *et seq.*
- C. EPA EPCRA Regulations, 40 C.F.R. Parts 350-372
- D. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 9
- E. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 11
- F. Executive Order No. 12856 of August 3, 1993, Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements
- G. Environmental Protection Agency document no. EPA 560/4-92-011, Title III List of Lists: Consolidated List of Chemicals Subject to Reporting Under EPCRA
- H. Deputy Under Secretary of Defense (Environmental Security) (DUSD(ES)) memo of 15 Feb 94, Subj: Implementing Guidance For Executive Order 12856: Federal Compliance With Right-to-Know Laws and Pollution Prevention Requirements [hereinafter DUSD(ES) memo of 15 Feb 94]

1702 OVERVIEW

A. **Background.** Title III of the Superfund Amendments and Reauthorization Act of 1986, also known as the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §§ 11001 *et seq.*, requires facilities that handle various chemicals to file numerous reports with regulatory agencies. These reports are *in addition to all otherwise required reports*. Previously applicable only to certain standard industrial classifications (SICs) of private industry, by Executive Order No. 12856 of August 3, 1993, EPCRA now encompasses most Federal facilities.

B. **Purpose of Act.** Congress enacted EPCRA in response to the 1984 Bhopal, India, methyl isocyanate chemical disaster which killed over two thousand people, mostly due to inadequate local contingency planning. The Act's purpose is twofold: first, EPCRA ensures the public is informed of the chemical risks at nearby facilities; and, second, it provides sufficient information and structure for adequate planning to protect the public.

C. **Facets of Act.** The four major aspects of EPCRA are:

1. Emergency planning;
2. emergency notification;
3. hazardous chemical reporting; and
4. toxic chemical release inventory reporting.

Each aspect is independent of the other, requiring compliance with separate report submission deadlines, and is applicable to individual lists of chemicals. At a facility level, EPCRA will require personnel and procedures to:

1. Identify chemicals;
2. estimate reporting threshold levels;
3. estimate releases and off-site transfers; and
4. ensure accurate reporting, recordkeeping and documentation.

1703

EXECUTIVE ORDER 12856: FEDERAL COMPLIANCE WITH RIGHT-TO-KNOW LAWS AND POLLUTION PREVENTION REQUIREMENTS

A. **General.** To ensure complete information regarding toxic chemicals is available for local planning purposes, and to demonstrate leadership in the field of pollution prevention, on August 3, 1993, the President signed Executive Order 12856, *Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements*. This order requires compliance with EPCRA and the Pollution Prevention Act of 1990 (PPA).

B. **Applicability**

1. **Facility.** According to EPCRA, a facility is "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person)." 42 U.S.C. § 11049(4). If at a facility owned by one Department of Defense (DOD) component, multiple DOD operations occur, the "fence owner" with primary responsibility for mission accomplishment is responsible for ensuring all reporting requirements are met. (See also Host / Tenant Relationships, at section 1711, below).

2. **Geographic location.** Executive Order 12856 applies to all DOD facilities within the customs territory of the United States, i.e. "all territories and possessions of the United States, except the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the Island of Guam." [19 U.S.C. § 1401(h).] Although DOD facilities not within the customs territory of the United States are not required to comply with the Executive order's requirements, they are encouraged to abide by the spirit of the Executive order and comply to the maximum extent practicable.

3. **State laws and regulations.** Many states have laws which parallel, modify, or augment Federal right-to-know and pollution prevention laws. The Executive order encourages compliance with such state or local requirements, to the extent not otherwise mandated.

4. **Base Realignment and Closure (BRAC) - listed bases.** Bases scheduled for closing prior to December 31, 1997, need not comply with the requirement to prepare a Pollution Prevention Plan nor are they subject to EPCRA section 313 reporting (see *DOD Guidance*, section 1108.B, below).

C. *Pollution prevention*

1. ***General.*** In addition to the requirements of EPCRA, the Executive order directs each Federal agency to conform to provisions of the PPA and reduce by fifty percent total releases and off-site transfers of certain toxic chemicals by the end of 1999. Further, agencies must establish plans to eliminate or reduce the unnecessary acquisition and use of products containing extremely hazardous substances or toxic chemicals. As this is Department-level action, facilities will be advised as appropriate of any required action or involvement.

2. ***Pollution prevention hierarchy.*** As established by the DUSD(ES) memo of February 15, 1994 (DOD policy) and reflecting the accepted manner of pollution prevention, installation pollution prevention efforts must recognize the established environmental management hierarchy:

- a. Pollution should be prevented or reduced at the source;
- b. pollution that cannot be prevented should be recycled in an environmentally safe manner;
- c. pollution that cannot be prevented or recycled should be treated in an environmentally safe manner; and
- d. finally, disposal or other controlled release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

3. ***Pollution prevention plans.*** All facilities (except BRAC-listed facilities scheduled to close on or prior to December 31, 1997) which meet or exceed any of EPCRA's thresholds must develop a pollution prevention plan. This requirement includes not only section 313 (42 U.S.C. § 11023) reporting thresholds, but also other thresholds set forth under sections 302-312 of EPCRA. 42 U.S.C. §§ 11002-11022. The plan should detail the facility's efforts to meet the DON's overall pollution prevention goals. This plan must be facility-drafted by June 1, 1995, Department reviewed by August, and completed by December 15, 1995.

**1704 COMMUNITY EMERGENCY PLANNING:
EPCRA SECTIONS 302-303**

A. **Regulatory framework.** The goal of emergency planning is to improve community emergency preparedness and response by establishing state and local organizations to coordinate and develop response plans. The planning organization structure consists of State Emergency Response Commissions (SERCs) which supervise Local Emergency Planning Committees (LEPCs).

B. **Required report.** EPCRA section 302 (42 U.S.C. § 11002) requires Federal facilities to make a one-time report to the SERC if any "extremely hazardous substance" (EHS) is present (produced, used, or stored) in excess of preestablished "threshold planning quantity" (TPQ) levels. The current list of EHSs and their TPQs is at 40 C.F.R. Part 355, Appendices A and B, which should be consulted for periodical additions.

C. **SERC notification.** Should any EHS exceed its TPQ, a letter should be sent to the SERC indicating that EHSs are present and that the facility may have to comply with EPCRA. The particular EHS present need not be disclosed nor are additional reports required should more than one EHS be present. Reports were required to be made by March 3, 1994, for those facilities at which EHSs were then present. Facilities which later become subject to section 302 due to subsequent initial presence of any EHS must notify both the SERC and appropriate LEPC within sixty days of such presence.

D. **Facility representative and additional information required.** The regional response plans developed by the LEPCs are likely to be reexamined now that Federal facilities will be required to provide information not previously required. EPCRA section 303 (42 U.S.C. § 11003) requires that a facility representative who will participate in emergency planning be identified to the LEPCs and that, upon request, facilities provide additional information to LEPCs. Facilities are also to inform LEPCs of "any relevant changes" which occur, i.e., facility changes which affect the regional response plan. Section 303 requirements must be complied with as of August 3, 1994.

1705 EMERGENCY NOTIFICATION: EPCRA SECTION 304

A. **Applicability.** Beginning January 1, 1994, EPCRA section 304 (42 U.S.C. § 11004) requires Federal facilities that "produce, use, or store" hazardous chemicals to report immediately the release of any EHS or CERCLA hazardous substance above the "reportable quantity" (RQ) and results in off-site exposure. RQs for EHSs are preestablished for the listed chemicals and are available at 40 C.F.R. Part 355, Appendices A and B. CERCLA hazardous substances and their RQs are

listed in 40 C.F.R. Part 302, Table 302.4. Both of these references should be periodically consulted for updates.

B. **Only releases beyond facility.** Only releases into the environment **beyond the facility's boundary** are subject to section 304 reporting; releases which are confined to the facility are not subject to this section. For purposes of section 304, "facility" includes motor vehicles, rolling stock, and aircraft. Releases from these facilities must be reported if occurring off-site (e.g., along a public roadway) and otherwise meeting the requirements of section 304.

C. **Initial notification.** The notification required must be made immediately—delays of as little as one-half hour have resulted in fines. The facility must notify the SERC and LEPC likely to be affected by the release not only the local commissions (**remember, this notification is in addition and not a substitute for any other notifications required by state or Federal law, e.g., National Response Center notification**). Notification must include:

1. Chemical name or identity;
2. whether the chemical is on the section 302 list;
3. estimate of the quantity released;
4. time and duration of the release;
5. media into which released;
6. acute or chronic health risks and appropriate medical treatment;
7. precautions to take; and
8. point of contact.

D. **Follow-up notification.** Written follow-up notification must be provided to the SERC and the LEPC as soon as practical after the reportable release. This report must update the initial report information, as appropriate, as well as provide the following information:

1. Actions taken to respond to and contain the release;
2. known or anticipated health risks associated with the release; and
3. medical advice regarding exposed individuals.

E. **Continuous releases.** Reduced reporting requirements apply to continuous releases, i.e. those that are continuous and stable in quantity and rate. For continuous releases, the facility must follow the initial notification procedures referred to in paragraph C, above. Absent statistically significant increases or compositional change, an annual report will suffice thereafter. Prior to reporting continuous releases, it should be determined if the release is a "federally permitted release" as defined in CERCLA § 101(10) and 42 U.S.C. § 9601(10) (e.g., a National Pollutant Discharge Elimination System (NPDES) permitted release). If so, the provisions of section 304 do not apply.

**1706 HAZARDOUS CHEMICAL REPORTING:
EPCRA SECTIONS 311-312**

A. **Section 311 applicability.** EPCRA section 311, (42 U.S.C. § 11021) requires submission of reports noting hazardous chemicals present throughout a facility to SERCs, LEPCs, and fire departments. Per section 311, all facilities required by the Federal Occupational Safety and Health Administration's (OSHA) Hazardous Communication Standard Regulations to prepare or have available Material Safety Data Sheets (MSDSs) must provide copies of the MSDSs for hazardous chemicals exceeding section 311 threshold requirements. The threshold is 10,000 pounds of a hazardous substance on-site; for EHSs it is the lesser of the TPQ (sections 302-303) or 500 pounds. 40 C.F.R. § 370.20(b).

B. **List requirements.** In lieu of submitting the MSDSs, facilities may submit a list of reportable chemicals by chemical name, common names, and facility name and location. This list must be grouped in the five health and physical hazards categories as specified in 40 C.F.R. Part 370:

1. Immediate (acute) health hazard;
2. delayed (chronic) health hazard;
3. fire hazard;
4. sudden release of pressure; and
5. reactive.

Note that the SERC, LEPC, and local fire department must each receive a separate report. Federal facility compliance is required by August 3, 1994; updates are required within three months of new materials being introduced on site or MSDS information having been received from a supplier.

C. **Section 312 annual inventory reporting.** EPCRA section 312 (42 U.S.C. § 11022) requires an annual inventory report of section 311-reportable chemicals present on-site, including maximum and average amounts present during the previous calendar year. While section 312 allows either a summary report (tier I) or detailed report (tier II) to be filed, many states require a tier II report. Annual reports must be submitted to the LEPCs, SERCs, and fire departments. Tier I and II report forms are available from the EPA, SERCs, LEPCs, and are set out at 40 C.F.R. Parts 370.40 and 370.41. Nineteen hundred ninety four (1994) is the first year for which a section 312 report is required and must be filed by March 1, 1995.

**1707 TOXIC CHEMICAL RELEASE INVENTORY REPORTING (TRI):
EPCRA SECTION 313**

A. **Applicability.** EPCRA section 313 (42 U.S.C. § 11023) requires the completion and submission of an annual release and off-site transfer report. Federal facilities exceeding the manufacture, process, or otherwise use thresholds for any chemical listed in section 313's toxic chemical list must provide a separate nine-page Form R report for each chemical.

B. **Use thresholds.** Thresholds exist for each of the three activities to which a chemical may be put—manufacture, process, or otherwise use. Facilities manufacturing or processing any of these chemicals in excess of 25,000 pounds are required to report releases of these chemicals. Facilities otherwise using listed chemicals in quantities over 10,000 pounds per calendar year must submit annual release forms. "Otherwise used" means intentional, nonincorporative uses such as reaction catalysts, lubricants, and waste treatment chemicals or "any user of a toxic chemical that is not covered by the terms manufacture and process." 40 C.F.R. 372.3.

C. **Form R report.** Form R requires inclusion of air (fugitive and point), water, and land releases, discharges to public-owned treatment works, and off-site transfers for treatment, storage, and disposal. Form R reports, with accompanying filing instructions, may be obtained by contacting the EPA. 1994 is the first year for which Form R reports are required for Federal facilities and must be filed with both the EPA and designated state agencies by July 1, 1995. TRI records should be maintained for up to seven years. 40 C.F.R. 372.30.

**1708 DISTINCTIVE APPLICABILITY OF EPCRA TO NAVAL
FACILITIES**

A. **General.** The Executive order directs that EPCRA and PPA, which were originally drafted to regulate private industry, are applicable to Federal facilities; as a result, a perfect fit does not exist in the application of the regulations.

Published EPA guidance is presently confined to private industry. The main area of contention between regulators and Federal facilities involves the applicability of regulatory exemptions: were the exemptions applied to Federal facilities, as written, a large number of toxic chemical releases would remain unreported.

B. **DOD guidance.** To provide guidance and uniform application of the goals of Executive Order 12856, DOD recently promulgated its policy regarding applicable section 313 exemptions and related areas.

1. **Primary mission.** To ensure the spirit of Executive Order 12856 is supported by DOD facilities, section 313 reporting is to be applied when the use or activity supports the "primary mission" of the facility. Conversely, the exemptions — uses and activities inapplicable to section 313 threshold determination and reporting — shall only be applied if the use or activity does not support the facility's primary mission. A facility's primary mission is the facility's "chief responsibility, including activities integral to the fulfillment of that responsibility." The determination of the primary mission has been left to installation commanders.

2. **Specific exemptions.** Exemptions to section 313 threshold determinations and reporting may be found at 40 C.F.R. § 372.38.

a. **Vehicle maintenance.** The motor vehicle maintenance exemption provides relief from ancillary reporting requirements for the private manufacturing industry, to which the use of vehicles is of little concern relative to the manufacturing process. To apply this exemption to ground support vehicles and other vehicles used to support a military facility's mission, however, appears counter to the purpose of the exemption and the Executive order. Products containing section 313-reportable toxics used for maintaining a facility's motor vehicles are therefore exempt unless the maintenance supports the primary mission of the facility (e.g., installation and depot-level maintenance of aircraft, ships, tanks, and tactical wheeled vehicles). The maintenance of staff cars and base maintenance and support vehicles is exempt, as is maintenance of aircraft or vehicles under field conditions.

b. **Janitorial / grounds maintenance.** Where routine janitorial and facility grounds maintenance requires the use of products containing toxic chemicals similar in type and concentration to consumer products, the use is exempted. Such products include cleaning supplies, fertilizers, and pesticides.

c. **Personal use.** Products containing toxic chemicals used by employees and personnel for personal comfort or necessity are exempt. Covered areas include cafeterias, commissaries, exchanges, MWR activities, and base medical facilities.

d. ***Integral presence in article.*** If an article containing toxic chemicals is present at a facility, the facility need not include the amount in its section 313 threshold determination and reporting. If the article naturally releases a toxic chemical or is altered such that a release occurs, the exemption does not apply.

e. ***Structural component.*** Passive use of toxic chemicals in a facility's structural components or the passive degradation of toxic chemicals due to naturally occurring corrosion or abrasion of the structural components is exempt from section 313 threshold determinations and reporting.

f. ***De minimis concentration.*** Chemical mixtures containing less than one percent by weight of a toxic chemical (0.1% if an OSHA-defined carcinogen) need not be included in section 313 threshold determinations and reporting.

3. ***Applicability to BRAC-listed bases.*** The DOD has concluded that practical constraints preclude requiring facilities that will close by December 31, 1997, from complying with certain provisions of Executive Order 12856. Accordingly, such bases need not prepare pollution prevention plans nor comply with EPCRA section 313 reporting.

1709 CLASSIFIED MATERIAL. Installations shall ensure that all information released pursuant to EPCRA or PPA is properly releasable and will not result in the compromise of national security.

1710 PROVISION OF INFORMATION TO HEALTH CARE PROFESSIONALS

A. ***General.*** Health care professionals may request information pertaining to chemicals that are manufactured, processed, used, or otherwise covered by EPCRA. The Local Emergency Plan (LEP) that each LEPC has coordinated should include provisions for providing this information upon request by health care professionals. Installations should direct all oral inquiries for information to the LEPC. If a written request for the specific name of an EHS, hazardous or toxic chemical is received from a health professional, the installation shall provide the information. The written request shall state that a reasonable basis exists to suspect that:

1. The information is needed for diagnosis or treatment;
2. the individual being diagnosed or treated has been exposed to the chemical concerned; and

3. knowledge of the specific chemical identity will assist in diagnosis or treatment. 42 U.S.C. § 11043(a).

Trade secret information may only be divulged upon the provision of a written confidentiality agreement. 42 U.S.C. § 11042.

B. **Medical emergency.** In an emergency, an installation may provide appropriate information compiled pursuant to EPCRA, if otherwise releasable, to a treating physician or nurse without a written request if:

1. A medical emergency exists;
2. the individual being diagnosed or treated has been exposed to the chemical concerned; and
3. knowledge of the specific chemical identity will assist in diagnosis or treatment.

Confidentiality agreements are not required prior to the transfer of information in an emergency, but may be required as soon as practical. 42 U.S.C. §11043(b).

1711 HOST-TENANT RELATIONSHIP

A. **Host responsibilities.** Host activities have responsibility for ensuring reporting requirements are met. A central activity should be identified as the installation's point of contact for all EPCRA and PPA matters. This activity may be a tenant command, and existing organizations and committees should be used to the maximum extent practical to achieve compliance with EPCRA and PPA requirements.

B. **Tenant responsibilities.** All tenant activities must provide appropriate information and support as identified by the host activity in a timely fashion.

1712 ENFORCEMENT

A. **State and Federal.** EPCRA provides for civil and criminal penalties—up to \$25,000.00 per day and imprisonment for up to two years. 42 U.S.C. § 11045. Section 5-502 of the Executive order, however, states that the sections of EPCRA regarding civil, administrative, and criminal enforcement are not applicable to Federal installations merely by operation of the Executive order. *Cf. U.S. Dep't of Energy v. Ohio*, 112 S.Ct. 1627 (1992) (Federal facility not subject to punitive civil

penalties in the absence of clear and unequivocal waiver of sovereign immunity). 42 U.S.C. § 11046.

B. **Citizen suits.** Although section 326 of EPCRA allows any individual to initiate an appropriate civil action (a "citizen suit"), the Executive order does not extend this right against Federal facilities.

1713 POINTS OF CONTACT

A. DON-specific questions regarding EPCRA, PPA, and Executive Order 12856 may be submitted to CNO (N-45), COMNAVFACENGCOM, or NAVFAC Engineering Field Divisions (EFDs) as appropriate.

B. General questions should be directed to the EPA. An EPCRA information hotline is maintained by the EPA: (800) 535-0202. In Washington, DC, and Alaska, the number is (202) 479-2449. Hours of operation are 8:30 a.m. to 7:30 p.m., Eastern Standard Time.

CHAPTER XVIII

**COMPREHENSIVE ENVIRONMENTAL RESPONSE,
COMPENSATION, AND LIABILITY ACT (CERCLA)****1801 REFERENCES**

- A. CERCLA, 42 U.S.C. §§ 9601 *et seq.*
- B. Executive Order 12580, Superfund Implementation (23 Jan. 1987), *reprinted in* 42 U.S.C.A. § 9615 at 179 (West Supp. 1990)
- C. EPA CERLCA Regulations, 40 C.F.R. Part 300 *et seq.*
- D. Defense Environmental Restoration Program (DERP), 10 U.S.C. §§ 2701 *et seq.*
- E. Resource Conservation and Recovery Act (RCRA) of 1976 as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §§ 6901 *et seq.*
- F. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROTECTION MANUAL, Ch. 13
- G. MCO 5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 14

1802 OVERVIEW. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides remedies for releases or threatened releases of hazardous substances. The last major amendments of CERCLA was the Superfund Amendments and Reauthorization Act 1986 (SARA). CERCLA and SARA are frequently referred to as "superfund." CERCLA is currently undergoing congressional reauthorization.

The regulations that implement CERCLA begin at 40 C.F.R. Part 300, starting with the National Contingency Plan (NCP). The NCP establishes the method for discovering, evaluating, and remediating releases of hazardous substances. The NCP also contains criteria for listing sites on the National Priorities List (NPL). The last

major revision of the NCP became effective March 8, 1990. However, as the NCP also covers oil spills, EPA recently proposed a revision to the NCP to implement the requirements of the Oil Pollution Act of 1990. See 58 Fed. Reg. 54,702 (Oct. 22, 1993).

1803 GENERAL APPLICABILITY OF CERCLA. CERCLA is triggered by any release or substantial threat of a release into the environment of a "hazardous substance" (or, to a lesser extent, by a release of any "pollutant or contaminant" which presents an imminent and substantial danger to the public health or welfare). Although many people casually refer to superfund sites as "hazardous waste sites," do not be confused. "Hazardous waste" is a term of art under the Resource Conservation and Recovery Act (RCRA). See Chapter 15. "Hazardous substance" is a term of art under CERCLA. While there is an overlap between what constitutes a hazardous substance and what constitutes a hazardous waste; the terms are *not* synonymous.

A. **Who is liable under CERCLA?** While the courts continue to wrestle with who is liable under CERCLA, responsible parties generally fall into four categories:

1. The current owner and operator of a facility or vessel;
2. the owner and operator of the facility at the time of disposal of any hazardous substance; {aka "owner / operators"} (The statutory definition of owner / operator contains an exemption from liability for a "person who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the ... facility {aka "secured creditors"}". *But see, Kelley v. United States EPA*, 15 F. 3d 1100 (D.C. Cir 1994); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp 573 (D. Md. 1986).
3. persons who contracted, arranged, or made an agreement for disposal or treatment (or transport for disposal or treatment) of hazardous substances at any facility containing those hazardous substances; {aka "arrangers"} and
4. persons who transported any hazardous substances to the facility, where the transporter selected the facility {aka "transporters"}.

B. **For what are they liable?** Responsible parties are liable for response costs, damages to natural resources, and the costs of any health assessments performed by the Agency for Toxic Substances and Disease Registry. Liability under CERCLA is "joint and several, strict, and retroactive." For those of you who have been out of law school awhile like me, that means you may be liable for 100% of the

response costs, without regard to fault, even if the acts which caused the release were perfectly legal when performed. Notwithstanding this liability scheme, some courts have refused to apply the "joint and several" provision against a single responsible party if there is a reasonable way to allocate fault (contribution). *In re Bell Petroleum Services*, 3 F.3d 889 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992). Also, the CERCLA liability scheme is being hotly debated during the CERCLA reauthorization process.

C. **Hazardous substances.** CERCLA defines "hazardous substance" in terms of other federal environmental laws. The term includes toxic pollutants and hazardous substances under the Clean Water Act (CWA), hazardous air pollutants under the Clean Air Act (CAA), imminently hazardous chemical substances under the Toxic Substances Control Act (TSCA), and hazardous wastes under the RCRA. Further, EPA identifies additional hazardous substances which may present substantial danger to the public health or welfare or the environment when released. These substances, and the corresponding reportable quantities, are listed in the NCP. 40 C.F.R. Part 302.

Petroleum products are **excluded** from the definition of a hazardous substance, even if those products contain hazardous constituents, so long as the hazardous constituent was part of the original product as sold on the market. *See, Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989). For example, the release of spent oil which had absorbed heavy metals through its use would not be excluded, but the release of leaded gasoline would be.

I think it's wisest to be practical about the petroleum exclusion. If it is not possible to determine, at a reasonable cost, whether the hazardous constituents were part of the original petroleum product, then there's no point in arguing that the exclusion applies. Likewise, if petroleum contamination is situated in such a way that it does not make economic sense to advance the exclusion (e.g., the petroleum contamination is sandwiched above or below other hazardous substances requiring cleanup), advancing the petroleum exclusion may cost you more in the end.

On the other hand, remediation of petroleum tends to be very "low tech." Extensive study under CERCLA may not be necessary, even if the petroleum is commingled with hazardous constituent(s). If you can convince the regulators to allow you to handle the situation under a program better suited for petroleum remediation (such as the Underground Storage Tank (UST) program under RCRA, 42 U.S.C. §§ 6991 *et seq.*), everyone may be better off.

Finally, if you are at a closing base or otherwise excessing property, Congress has already eliminated the petroleum exclusion for you. *See*, section 1809 of this chapter.

D. **Pollutants and contaminants.** The phrase covers any substance that may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions, or physical deformations. (Petroleum products are also excluded from the definition of pollutants and contaminants.)

E. **Releases.** The definition of "release" under CERCLA is very broad and includes almost any act, including spilling, leaching, dumping, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, or disposing into the environment. ***The term also includes the abandonment or discarding of barrels, containers or other closed receptacles.*** Some releases are excluded from the CERCLA definition, including work place exposures (regulated under the Occupational Safety and Health Act (OSHA)), engine exhaust from motor vehicles, vessels and other sources; emissions from materials regulated under the Atomic Energy Act; and certain releases under permit.

F. **Response actions.** There are two types of "response actions" under CERCLA: removal actions and remedial actions.

1. Removal actions are primarily responses intended for short-term abatement of hazards presented by release. Removal actions are generally limited to \$2 million or 12 months of work, whichever first occurs. Typical removal actions include provision of bottled water, small scale soil excavation, security fencing, drum removal, etc.

2. By contrast, remedial actions are intended to address long term risks and provide permanent remedial activity to restore general environmental quality. Typical remedial actions include construction of a cap, groundwater pumping and treatment systems, incineration, collection of leachate, etc.

G. **Response costs.** Response costs are not defined, but have been held to include any costs associated with the study and cleanup of the site(s), including costs associated with consultants, laboratory services, sampling and analysis, public meetings, and regulatory oversight. *But see, United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3rd Cir. 1993). Response costs probably do not include diminution of real estate value, medical monitoring, etc.

1804 AUTHORITIES AND RELATIONSHIPS. Most of the authorities and responsibilities under CERCLA are vested in the President. By Executive order, they are then passed to various Federal agencies. *See*, Executive Order 12580, Superfund Implementation (23 January 1987). EPA is given most of the responsibilities under CERCLA, but the Department of Defense (DOD) is given substantial authority over the cleanup of property it owns or operates. In addition, the Superfund Amendments

and Reauthorization Act of 1986 included certain statutory provisions that apply only to DOD. See, 10 U.S.C. §§ 2701 *et seq.* These provisions, known as the Defense Environmental Restoration Program, supplement our obligations and authorities under CERCLA.

Thus, the nature and extent of our involvement under CERCLA differs greatly between sites that are on property we own and sites that are on property we do not currently own. If the site is located on our property, the Navy is the lead agency and we control the study and cleanup of the property, with the concurrence of EPA (or the state). If the site is on property we do not own (e.g., we arranged for hazardous waste to be disposed of at a municipal landfill), EPA (or the state) is the lead agency and we are merely one more "potentially responsible party (PRPs)."

As you can imagine, when we act as lead agency, we have substantial management functions. Within DOD, the cleanup program of our own property is known as the Defense Environmental Restoration Program (DERP). Within the Navy, it is better known as the Installation Restoration Program (IRP). Specific responsibilities are laid out in OPNAVINST 5090.1A, Ch. 13. In general, the Naval Facilities Engineering Command (NAVFACENGCOM) performs the program management functions (including the contracting and the distribution of funds), while the Naval Activities perform the community relations and public affairs office (PAO) functions.

By contrast, our involvement at "third party sites" is usually quite minimal. We rarely get involved in the management of these sites and our efforts tend to focus on extricating ourselves as soon as possible. Normally, this is done by placing a value on our contribution to the problem and "cashing out" as quickly and as completely as possible. The Army Corps of Engineers (COE) has been given the responsibility to handle sites located on property which the DOD used to own (under the "Formerly Used Defense Sites" program); the NAVFACENGCOM has responsibility for all other third party sites, for the Navy.

1805 NPL, CLEAN-UP PRIORITIES AND FUNDING. To some extent, the application of CERCLA to a specific site will vary depending on whether the site is on NPL.

A. **NPL.** CERCLA, (42 U.S.C. § 9605), required EPA to identify the "nation's worst sites" by creating a system for determining cleanup priorities. To do this, EPA uses a model called the Hazard Ranking System (HRS) (the current version is called HRSII). The HRS assesses the potential risk posed by the site based on factors such as the quantity, toxicity, and concentration of contaminants at the site; the potential for releases from the site; and the degree of risk to health and the environment. Application of the model to a site (or, more commonly for us, to an

installation) produces a score. If the score is above 28.5 points, EPA may place the site (installation) on the NPL. EPA uses the same criteria for listing private and federal sites.

Inclusion on the NPL is an administrative function of the EPA. No hearing is required or provided, prior to being placed on the NPL. However, before including site / installation on the NPL, EPA will propose a site for inclusion (published in the federal register) and will solicit comments. A site / installation can remain in this limbo status (proposed, but not actually included on the NPL) for months or even years. Administrative guidelines used to make NPL decisions are published in the NCP. (40 C.F.R. Part 300.)

B. *What are the boundaries of an National Priorities Listing?*

Because being on the NPL drives other important concepts under CERCLA, like applicable law, it is important to understand the boundaries of a National Priorities Listing. The law states that EPA shall list "sites." It seems fairly obvious that what Congress meant by "site" was a discrete area of contamination. However, for administrative convenience, EPA often includes entire facilities on the NPL. For NAVFAC, that frequently means several areas of discrete contamination and many acres of uncontaminated property. While this type of "fence to fence" listing has its downsides, one benefit is that you do not have to go through the tortuous listing procedure every time a new area of contamination is discovered. Newly discovered areas within the fence line are merely added to the overall cleanup program by the project managers.

C. *What if Navy contamination migrates beyond our property line?*

If your facility is on the National Priorities Listing and the off-base contamination is solely caused by on-base sources (in other words, your contamination plume hasn't mixed with a third party's plume), then the NPL *and our authorities under CERCLA* follow the contamination. It has been argued that the same is true even if the facility is not on the NPL, but this is not a universally held interpretation. Regardless of whether the installation is on the NPL, when our contamination migrates off our property, you have to start thinking of private property rights. CERCLA has special rules intended to protect the private property owner. See, Section 1807 of this chapter.

D. *Non-NPL sites.* If an area of contamination is not included within the boundaries of an NPL site, it is a "non-NPL" site by default. This distinction not only effects who will be involved (EPA ignores non-NPL sites), but also determines what law(s) will apply. CERCLA at 42 U.S.C. § 9620 (a)(1) and (4) states:

"Each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent . . . as any nongovernmental entity . . . State

laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard and requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, and instrumentality."

In other words, so long as they do not discriminate against the United States, state "removal and remedial actions" laws apply to non-NPL sites on facilities we own.

Does this mean that state law applies in lieu of federal law at non-NPL sites? No. DOD has taken the position that, if the state has a qualifying "removal or remedial action" law, it will apply at non-NPL sites, to the extent such state law is not inconsistent with CERCLA. DOD has also taken the position that our authority under CERCLA to control the cleanup of our property also still applies, whether or not the site is on the NPL. However, many states disagree. They see the NPL v. non-NPL distinction as a shift in power, allowing them to call the shots at non-NPL sites.

For years, it was generally assumed that in order to qualify as a law concerning "removal and remedial action" the state law had to resemble CERCLA. These laws were known as mini-superfunds, and many states have such laws on the books. However, in *United States v. Commonwealth of Pennsylvania Department of Environmental Resources*, 778 F.Supp 1328 (M.D. PA. 1991) the Court held that Pennsylvania's Clean Water Act constituted a "removal and remedial action" law for purposes of CERCLA § 9620(a)(4).

What about third party sites that are not on the NPL? While this is an area that I suspect only the Army Corps of Engineers or NAVFAC attorneys will have any real interest, students of the obscure may want to read the following: *Tenaya Associates Limited Partnership v. United States Forest Service*, No. CV-F-92-5375 REC (E.D. Cal. May 18, 1993) (holding that 42 U.S.C. § 9620(a)(4) includes all actions brought against the United States for harms which occurred when the United States owns or operates the facility); *Redland Soccer Club, Inc. v. Department of the Army*, 801 F. Supp. 1432 (M.D. Pa. 1992); and *Rospatch Jessco Corp. v. Chrysler Corp.*, 829 F. Supp 224 (W.D. Mich. 1993), (holding that 42 U.S.C. § 9620(a)(4) applies only to facilities currently owned or operated by the United States).

E. **"Cleanup priorities and funding."** CERCLA created a funding mechanism for clean-up efforts to minimize expenditure of general tax revenues. This funding mechanism has come to be called the superfund. Only sites on the NPL

are eligible for superfund money. This funding distinction has lead some EPA personnel to conclude that CERCLA only applies to NPL sites. Don't be fooled!! The bulk of CERCLA's provisions apply whether the site is on the NPL or not.

Except in a few very rare instances, the superfund is not used to finance DOD cleanups. Instead the costs of the IRP are funded through either the Defense Environmental Restoration Account (DERA) for active bases or the Defense Base Closure Account for closing bases.

1. In fiscal terms, DERA is a "transfer account" as it can be transferred to any other account. Once transferred it takes on the characteristics of the account to which it is transferred. Essentially, it is fenced-off funds for IRP expenses, that are used via another account (e.g., Operations and Maintenance Navy (O&MN)). See, 10 U.S.C. § 2703. In the early years of the CERCLA program, DERA funds were abundant, with the exception of a general notion of "worst first," the Navy did not concern itself much with prioritizing sites. As DERA funds became more scarce, prioritizing sites became more important. Some of the factors that are considered in prioritizing sites (funds) are: risk to human health and the environment, inclusion on the NPL, existence of an order, Consent Decree, or Federal Facility Agreement (FAA), etc.

2. When installations are included in the final list of bases to be closed under the Base Realignment and Closure Acts (BRAC), the Defense Base Closure Account is used for any environmental cleanup costs. In fiscal terms, the Defense Base Closure Accounts are separate "stand alone" accounts. See, 10 U.S.C. § 2687 Notes; BRAC I § 207(b); BRAC II § 2906.

1806 THE CLEANUP PROCESS. CERCLA envisioned a very orderly and rigid process for handling releases of hazardous substances. Under the statute, first step is to identify potential sites, then the sites are studied, then remediated. The problem with this approach is that it encouraged what some call "paralysis by analysis."

The process detailed below is the process envisioned by the statute; not necessarily what happens in real life. In reality, the Navy combines steps or even takes steps "out of order" to reach cleanup as quickly as possible.

A. **Identification.** All federal agencies are required to identify facilities with hazardous substance disposal sites. In this context, "disposal" includes places where hazardous substances have leaked or spilled.

B. **The docket.** EPA is required to determine, under 42 U.S.C. § 9620(c), whether a Federal facility should be placed on the Federal Agency Hazardous Waste

Compliance Docket. The Docket is published in the federal register and contains information on suspected contamination from each listed facility. Once the federal facility is placed on the docket it must perform a Preliminary Assessment (PA).

C. **Community relations program.** Per the NCP and paragraph 13-4.9 of OPNAVINST 5090.1A, a Community Relations Program will be established at Navy installations with sites on the Docket. The program develops a community relations plan to conduct activities to ensure public participation during the installation restoration process. These activities may include holding public interviews and meetings, establishing information repositories, and developing responsive summaries to public comments.

D. **Preliminary assessment (PA).** The PA is a quick review, used to determine if further study is necessary. During the PA, the Navy uses existing site records and interviews to: evaluate potential hazards at the site; identify the source and nature of a release; and identify any other PRPs. The PA does not normally include a site visit or sampling. Information from the PA is to be used to determine if facilities should be placed on the NPL. Sites which pose no threat or potential threat to public health and the environment are excluded from further consideration for remediation. (This step is often combined with the Site Inspection (SI) and is typically done before the facility is placed on the docket.)

E. **Site Inspection (SI).** The SI is an optional step used to obtain additional information to complete HRS scoring or to determine need for response action. The SI may include visual on-site inspection and limited sampling.

F. **Technical review committee (TRC).** As soon as the SI indicates that an Remedial Investigation / Feasibility Study (RI / FS) is necessary, the Commanding Officer (CO) of the installation must establish a TRC for the site / installation. The establishment of a TRC is one of those obligations found in the DERP (10 U.S.C. §§ 2701 *et seq.*) not CERCLA. The TRC is a committee comprised of EPA, state, and local representatives, and member(s) of the public who meet to review and comment on actions and proposed actions regarding sites in the IRP. While the TRC reviews and comments on IRP activities, the committee has no approval or veto authority. (Some installations are currently experimenting with an expanded version of the TRC called a Restoration Advisory Board (RAB).)

G. **National Priorities List (NPL).** EPA then determines whether the contamination warrants inclusion on the NPL.

H. **Remedial Investigation / Feasibility Study (RI / FS).** Facilities on the NPL must begin an RI / FS within six months after being placed on the list. The RI is the detailed site evaluation and analysis process conducted to characterize the site, the nature and extent of its contamination, and the risk it presents. The RI

typically involves scoping, data collection, extensive sampling, and risk assessment. (In the Navy, this step is often started before the installation is even proposed for inclusion on the NPL.) The FS is an analysis of the alternatives for cleanup.

1. ***How clean is clean?*** CERCLA has no cleanup standards of its own. Instead, it borrows cleanup standards from other federal and state laws, though a process called selection of ARARs. ARARs stands for "applicable *or* relevant and appropriate" requirements. A law is "applicable" if the legal standards would apply independently of the CERCLA clean-up. A law is "relevant and appropriate" if it makes sense at the site even though not legally applicable.

Although; CERCLA has no cleanup standards of its own, it has a strong emphasis on site specific risk. (In other words, cleanup levels that are geared toward the unique circumstances of the sites, as opposed to cleanup standards that are established in a vacuum.) Site specific risk is determined through a process called "Baseline Risk Assessment" (which is part of the RI). This risk assessment compares the site to the standard for "acceptable risk" established by the EPA. Acceptable risk is expressed in terms of carcinogens or non-carcinogens. If the site does not present an unacceptable risk, then no further action is required.

As you can imagine, not everyone agrees with the EPA's concept of "acceptable risk" (including many states who have established, through their mini-superfund laws, their own concepts of "acceptable risk" and "how clean is clean"). This tension between compliance with standards borrowed from other laws (including state laws) and the emphasis on site specific risk, has caused innumerable arguments, not only as to "how clean is clean," but "who decides how clean is clean." During the superfund reauthorization process these issues will be hotly debated. For now, cleanup standards are largely a matter of negotiation between the lead agency, the regulators, and the affected community.

2. ***Waiver of cleanup standards.*** In selecting the method of cleanup, ARARs may be waived in certain circumstances (e.g., where compliance with the ARAR would present a greater risk of harm than another alternative). See, CERCLA 42 U.S.C. § 9621(d)(4). The decision to waive an ARAR must be based on "substantial evidence." States may challenge a waiver in federal court. If the challenge fails, the state may still require compliance with the ARAR if the state agrees to pay the added cost. DOD has argued that as lead agency we have the authority to waive ARAR. However, such waivers are not common as they tend to be extremely controversial.

I. ***Administrative record.*** The lead agency is required to maintain an administrative record containing all the documents that form the basis for the selection of response action(s). The administrative record is open to the public and

should be placed at or near the site. See, 40 C.F.R. § 300.800. (Within the Navy, the administrative records are maintained by NAVFACENGCOM.)

In addition to the administrative record, the lead agency usually establishes information repositories in local libraries or other public places. An information repository is not the official record and normally only contains items of general public interest.

J. ***Interagency Agreement (IAG)***. For NPL sites, the Assistant Secretary of the Navy (Installation and Environment) (ASN(I&E)) and EPA must enter into an IAG for the expeditious completion of all necessary remedial action at the facility. By statute, the IAG must be negotiated within 180 days after EPA reviews the RI/FS. However, by agreement between EPA and DOD, these agreements are negotiated early (usually shortly after the facility is proposed for inclusion on the NPL). In addition, though not required by statute, the state in which the installation is located is offered the opportunity to participate as a signatory to the agreement. To distinguish these agreements from the statutorily required IAG, they are called Federal Facility Agreements (FFAs). FFAs include a number of boilerplate clauses, including deadlines and stipulated penalties for the failure to meet such deadlines.

K. ***Proposed plan and community acceptance and the record of decision***. After the RI / FS is completed, a proposed plan is written. In the proposed plan the lead agency describes the site(s), describes the nature and extent of contamination, summarizes the risks, and explains the options for remediation. The lead agency also presents its preferred approach to remediation, based on cost, compliance with ARARs, long and short term effectiveness, protection of health and the environment, reduction in toxicity, volume or mobility of hazardous substances, implementability, and state and community acceptance.

The proposed plan is presented to the public and the public is encouraged to comment on it via a formal public comment period and public meetings. At the time the proposed plan is developed, the lead agency usually has a good idea of the level of state acceptance, but has to guess at the level of community acceptance. That's one of the reasons why the public comment period and the community meeting are so important. (Public meetings under the IRP differ from public meetings under other programs, such as the National Environmental Policy Act (NEPA), in that an exchange of information and ideas between the lead agency, the regulators, and the public is encouraged.)

If the level of acceptance for the proposed plan is high, the remedy selected is documented in a Record of Decision (ROD). If the proposed plan does not have a high level of community acceptance, the project managers will most likely rethink the proposed approach. Community acceptance is not required (as it is just one factor

among many that the lead agency must consider), but it is usually important enough to the installation, that it is given great weight.

The ROD is prepared by NAVFACENGCOM and signed by the CO of the installation. There is no limit on the number of RODs that can be issued. Usually "like" sites are grouped together into a single ROD, but that decision is driven by administrative convenience and cost savings, not statutory requirements.

L. **Remedial design / remedial action (RD / RA).** Once the ROD is signed, RD / RA begins. DOD has taken the position that permits are not necessary to perform remedial actions at a site governed by CERCLA (42 U.S.C. § 9620). Following remedial action, operation and maintenance activities are conducted to maintain the long-term viability of the remedial action. Substantial continuous physical on-site remedial action must be started at each facility not later than 15 months after completion of the RI / FS. Depending on the nature of the remedial action, long term monitoring may be necessary to ensure the remedy is effective.

M. **Remediation complete.** When no further response is appropriate, a site (installation) is deleted from NPL. EPA consults with the state in the delisting decision. Records must be maintained for 50 years.

1807 ACCESS TO PRIVATE LAND. By section 2(d) of Executive Order 12580, the President has delegated authority to DOD to take removal and remedial action off the installation, if the installation is the "sole source" of off-site contamination. This authority must be exercised consistently with CERCLA (42 U.S.C. § 9620) as discussed above. The Navy might have to exercise this authority, for example, when contamination at a site on the installation migrates onto private lands. These provisions apply whether or not the site is on the NPL.

A. Per OPNAVINST 5090.1A, NAVFACENGCOM is responsible for obtaining access to private property. While consensual access is obviously preferred, it is possible (with the help of the U.S Attorney's Office) to obtain access, without the landowner's consent. The first step is to identify the landowner. Under CERCLA (42 U.S.C. § 9604(e), the landowner has a right to (1) a receipt for any sampling done on their property, (2) the right to take a "split sample" (though, presumably, any laboratory costs associated with the landowner's half of the sample would have to be borne by the landowner), and (3) the right to receive a copy of the test results.

B. Although there are not many cases on point, the few courts that have examined the issue of off-site sampling have concluded that such access, if uncompensated, could constitute a taking of property. *See Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). Therefore, to avoid even the appearance of an unconstitutional taking of property, an appropriate legal document should be

prepared and "value" should be given for the "property" we propose to take from private property. For example, if the Navy wishes to place a monitoring well on private property, then a lease or license could be negotiated; if the Navy wishes to sample oysters from a neighboring commercial shellfish operation, then a small purchase agreement for the purchase of the oysters could be negotiated.

C. If consent is refused, an administrative order under CERCLA (42 U.S.C. § 9604(e)) may be used to gain entry. That section allows the President to issue an administrative order for entry when consent is not granted by the landowner. Executive Order 12580, sections 2(d) and (j), delegates that authority to the heads of executive departments where the sole source of the release is from the department's facility, but prior concurrence of the Attorney General must be obtained.

D. Other parties associated with the cleanup may also have independent authority to obtain access to private property. For example, EPA has also been delegated authority under CERCLA 42 U.S.C. § 9604 and state agencies (such have Health Departments) often have police powers upon which they can rely. If access to private property is necessary and consent has not been given, it may be wise to enlist the assistance of these agencies.

1808 RCRA / CERCLA OVERLAP. CERCLA provides that nothing in 42 U.S.C. § 9620 will impair RCRA obligations, including RCRA corrective action requirements. The potential exists for states to order RCRA corrective action at facilities being cleaned up under CERCLA and the IRP. For example, if a facility has a hazardous waste operation that requires a RCRA permit, the state permit authority may require the owner to take corrective action to remediate any releases or threatened releases of hazardous waste or contaminants from any solid waste management unit (SWMU) located anywhere on the facility. This may include the same areas on base being addressed under the IRP and CERCLA. States may also try to use their RCRA permit authority to control the clean-up. The differences of opinions between state and federal officials on the questions of "How clean is clean?" and "How fast is fast?" tend to get exaggerated by RCRA / CERCLA overlaps.

A. At NPL sites where RCRA also applies, CERCLA suggests that the EPA *should* control clean-ups. If a compromise can not be reached, EPA *can* override state-directed RCRA corrective action requirements once an RI / FS has been initiated. *But see, United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993). That event may be before or after the site is listed on the NPL.

B. To avoid RCRA / CERCLA conflict, EPA has proposed regulations to implement a corrective action procedure designed to be compatible with CERCLA process. *See*, 55 Fed. Reg. 30,799 (July 27, 1990) & 58 Fed. Reg. 8,658 (Feb 16, 1993). I have found that the best way to find a way out of the RCRA / CERCLA

labyrinth is to identify and work closely with a regulator who understands the jargon and philosophy of both laws. Usually this is at a management level above the waste and superfund units.

1809 SPECIAL CONSIDERATIONS FOR CLOSING BASES. The Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, (BRAC 88) and the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, as amended (BRAC 91, 93, & 95) govern the closure and realignment of DOD installations.

A. ***The Community Environmental Response Facilitation Act (CERFA).*** CERFA, Pub. L. No. 102-426, amended CERCLA 42 U.S.C. § 9620(h) and required the identification of all "uncontaminated" real property at DOD installations undergoing closure or realignment before subsequent disposal.

1. ***Parcelling.*** CERFA legitimized the term "parcelling." The idea is that, at the early stages of the closure process, the "uncontaminated" parcels will be identified, with the concurrence of EPA or the state (depending upon whether the installation is on the NPL). The "uncontaminated" parcels may then be promptly transferred to the new owner, while the rest of the parcels will be transferred at a later date. Of course, the parcelling has to be done with the ultimate reuse plan in mind. It makes no sense to identify parcels that are too small to be meaningful to the ultimate recipients or to identify a parcel of "uncontaminated" property for prompt transfer if for other reasons it is not suitable for early transfer.

2. ***"Definition of uncontaminated."*** CERFA has a very narrow and unconventional definition of "uncontaminated." (Uncontaminated property, for purposes of CERFA, is defined as any real property on which no hazardous substance and no petroleum product or their derivatives, including aviation fuel and motor oil, were stored for one year or more, known to have been released, or disposed of.) This has caused some to logically (yet incorrectly) assume that parcels which do not qualify as "uncontaminated" under CERFA are automatically contaminated and must be cleaned up. Instead, what you end up with are property that needs to be studied and / or cleaned up and "other property." An example of the later would be property where there once was as release of a hazardous substance, but it has already been cleaned up.

3. ***Finding of suitability to transfer / lease.*** The way "uncontaminated" parcels are identified is through a process called the "Environmental Baseline Survey" which is usually based on existing information regarding the storage, release, treatment or disposal of hazardous substances or petroleum products. In certain circumstances, additional data (e.g. field sampling) may be needed to support the determination. When the survey is completed a Finding of Suitability to Transfer or Lease is prepare and signed. As base closure

requirements change frequently, it is best to obtain the most current DOD and Navy guidance before attempting to perform an Environmental Baseline Survey or Finding of Suitability to Transfer / Lease.

B. **Property transfers.** Whenever a federal agency enters into a contract for sale or otherwise transfers property on which any hazardous substance was stored for one year or more, known to have been released or disposed of, the contract shall include certain information about the hazardous substance(s), such as the quantity released. See 42 U.S.C. § 9620(h)(1). This is true whether or not the property to be transferred is on a closing base. In addition, if the transfer is by deed (i.e., to a non-federal owner), the deed must include certain representations and a covenant warranting that all remedial action necessary to protect human health and the environment has been taken and that any additional remedial action found necessary later will be conducted by the United States. See 42 U.S.C. § 9620(h).

When transferring property covered by a FFA, Order, or Interagency Agreement, make sure to check the governing document to make sure you've met any additional requirements.

1810 SPECIAL CONSIDERATIONS FOR RADIONUCLIDES. A variety of federal laws deal with the regulation of radionuclides, including the Atomic Energy Act, RCRA, and TSCA. CERCLA also covers radionuclides to the extent that there is a release or threatened release of radionuclides. In addition, a number of different federal agencies exercise regulatory control over radionuclides, including the Departments of Energy and Defense, the Nuclear Regulatory Commission (NRC), and EPA.

No one knows exactly how many sites in the United States are contaminated with radionuclides. Sites range from corners of laboratories contaminated with small amount of short-lived, low-level wastes to sprawling nuclear weapons facilities with long-lived, high-level wastes. Progress at these sites has generally been slow. This has been due, in large part, to the lack of cleanup standards for radionuclide contamination. In fact, EPA and other agencies are just now starting to get their arms around the magnitude of the problem.

The following reading material is recommended for individuals who find themselves involved with sites contaminated by radionuclides:

A. *Issues Paper on Radiation Site Cleanup Regulations*, EPA 402-R-93-084, Air and Radiation (6603J) (Sept. 1993);

B. *Federal Radiological Emergency Response Plan*, 49 Fed. Reg. 35,896 (Sept. 12, 1984);

C. EPA Proposed Rule, 58 Fed. Reg. 54,702 (Oct. 22, 1993) (*see discussion regarding the NCP and the Federal Radiological Emergency Response Plan beginning at page 54,707*); and

D. Richard T. Whitman, *Radiation and the Environmental Officer*, Fed. Facilities Env'tl. J. (Autumn 1991).

1811 RELEASE REPORTING REQUIREMENTS

A. **CERCLA**. Under CERCLA 42 U.S.C. § 9603, facilities must report releases of hazardous substances equal to or exceeding "reportable quantities," unless the release is federally permitted. Reportable quantities for hazardous substances, typically one pound, are listed at 40 C.F.R. Part 302.4. Facilities must immediately notify the National Response Center (NRC) as soon as they learn of a release [(800) 424-8802 or (202) 426-2675]. The person in charge of the vessel or facility is responsible for making the report. Failure to make a required report may result in civil or criminal penalties.

B. **DERP**. Under DERP, DOD facilities must give prompt notice of *any* release of a hazardous substance to the regional EPA office, state, and local authorities. There is no de minimis exception. Does this mean that every release, however minuscule, has to be reported? It is suspected that regulators would be extremely annoyed if the response system was exercised for every drop or two of a hazardous substance. On the other hand, if you find yourself consulting the table of reportable quantities, don't bother — just report it.

In addition to reporting the release, the facility must advise the regional EPA office, state, and local authorities of the extent of the threat to public health and the environment and the proposed response to the release. There are no statutory penalties for failure to make required reports, but check interagency agreements — such as FFAs — which may provide penalties to enforce this requirement.

1812 CERCLA ENFORCEMENT

A. **Information gathering**. In addition to the information generated by the reports discussed above, EPA has broad authority to gather information from PRPs to identify the existence and source of a release or a threatened release. To obtain such information, EPA sends the PRP a letter of notice or demand letter. EPA may request information regarding the types of materials generated and treated, and the nature and extent of a threatened release.

B. **Inspections.** In addition to the right to get information from PRPs, EPA has the right of access to the PRPs facilities. EPA uses this authority to conduct inspections and sampling tests. (Also, under most FFAs, EPA has the right to take split samples.)

C. **Administrative orders.** Under 42 U.S.C. § 9606 of CERCLA, EPA can issue such administrative orders as may be necessary to protect public health and welfare and the environment. The threshold of danger necessary to uphold an EPA administrative order is low. Health dangers may be deemed "imminent" even if its manifestations will be in the distant future. EPA can order a private entity to take actions that will stop a release or to clean up a site. EPA needs the Department of Justice (DOJ) concurrence to issue such orders to other Federal agencies. Those who fail to comply with an order may be fined up to \$25,000.00 per day of violation, plus treble "damages." If the party who received the order is not financially liable for the clean-up, they can seek reimbursement from the superfund or contribution from other PRPs. (If an FFA is executed, it is unlikely, though not impossible, that EPA will issue an administrative order.)

D. **Judicial enforcement.** EPA is responsible for ensuring that removal or remedial actions are taken in response to releases of hazardous substances and pollutants or contaminants. EPA may itself take appropriate action and seek reimbursement from responsible parties under CERCLA (42 U.S.C. § 9607) as discussed above. Alternatively, EPA can seek a court order or injunctive relief necessary to abate an imminent and substantial endangerment to the public health or welfare or the environment because of the actual or threatened release of a hazardous substance from a facility. EPA can seek a court order in addition to, or in lieu of, its own administrative orders.

E. **Citizen's suits.** CERCLA (42 U.S.C. § 9659) provides that any person may bring a civil suit against *any person*, including the United States, for violation of any "standard, regulation, condition, requirement or order which has become effective" under the statute. This provision specifically includes requirements imposed in IAGs under 42 U.S.C. § 9620. Prevailing plaintiffs are not entitled to "damages"; the relief is enforcement of the standard and possibly civil penalties. Plaintiffs must give 60 days' notice to the EPA, the state, and the alleged violator before bringing suit. The action is not ripe if EPA has begun and is diligently pursuing a *judicial* action against the defendant for the alleged violation.

F. **Criminal provisions.** Any person who fails to make a required CERCLA report as discussed above is subject under CERCLA (42 U.S.C. § 9603) to a maximum punishment of a \$250,000.00 fine and imprisonment for three years.

CHAPTER XIX

TOXIC SUBSTANCES CONTROL ACT (TSCA)

1901 REFERENCES

- A. Toxic Substance Control Act (TSCA), 15 U.S.C. §§ 2601 *et seq.*
- B. EPA TSCA Regulations, 40 C.F.R. Parts 700 *et seq.*
- C. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Chs. 9, and 17
- D. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 9
- E. Navy Ships Technical Manual (NSTM), Ch. 593
- F. NAVSEA Shipboard Management Guide for Polychlorinated Biphenyls (PCBs), NAVSEA S9593-A1-MAN-010

1902 OVERVIEW. The Toxic Substances Control Act (TSCA) (15 U.S.C. §§ 2601 *et seq.*) requires the testing of potentially toxic chemicals, and it empowers the Environmental Protection Agency (EPA) to prohibit or condition the manufacture, distribution, and use of such chemicals based on that information. Section 4 of TSCA (15 U.S.C. § 2603) establishes the framework for testing chemical substances, section 5 (15 U.S.C. § 2604) creates the mechanism for screening new chemical substances or new uses of existing chemical substances, and section 6 (15 U.S.C. § 2605) addresses the range of actions available to EPA to control the manufacture, use, and disposal of chemical substances determined to be toxic. In addition, TSCA addresses three specific chemicals of particular interest to the Navy: polychlorinated biphenyls (PCBs); asbestos; and radon. This chapter will examine PCB regulation and radon; asbestos will be discussed in Chapter 20 of this Deskbook.

1903 APPLICABILITY TO FEDERAL FACILITIES. TSCA does not contain a specific waiver of sovereign immunity and is silent on the extent to which Federal facilities are obligated to comply with its terms. It does, however, include a provision which permits citizen suits against "any person, including the United

States" for violations of its provisions. 15 U.S.C. § 2619. Moreover, certain regulatory provisions of TSCA include the Federal Government under the definition of "person." The uncertain effect of these regulations has yet to be challenged. The Department of the Navy policy, consistent with Executive Order 12088, is to comply with the substantive provisions of TSCA. Further, compliance is dictated by the parallel regulation of TSCA's toxic substances as hazardous substances under CERCLA, thereby triggering reporting requirements and potential liability in the event of a release. In the context of PCB regulations, practical considerations mandate compliance given that contractors may be unwilling to accept Navy PCB waste for disposal unless it is properly manifested. Navy policy does not, however, extend to paying civil penalties or being subject to other enforcement sanctions for noncompliance with TSCA.

1904 PCB REGULATIONS. Polychlorinated biphenyls (PCBs) are used as an insulating fluid in electrical transformers and capacitors; they have been banned from further production. The principal uses of PCBs in the Navy are in electrical equipment, hydraulic fluids, and in felt material used as sound dampening on submarines and as ventilation gaskets and machinery mounts on all types of naval vessels. Federally, PCBs are regulated *exclusively* under TSCA. States may regulate PCBs in concentrations less than 50 parts per million (ppm) as hazardous waste under their RCRA regulations. As under RCRA, EPA regulations create a system of tracking PCB wastes from cradle to grave. PCB waste is generally defined as those PCBs or PCB items—such as transformers, capacitors, and the like containing PCBs in concentrations of 50 ppm or greater—that are no longer used for the purpose intended. Transporters, disposers, commercial storers, and certain generators of PCB wastes must give EPA notice of their activities and obtain identification numbers. 40 C.F.R. Part 761.

1905 PCB USE. TSCA prohibits the use of most PCBs unless the EPA Administrator, through rulemaking, first finds that the proposed use "will not present an unreasonable risk of injury to health or the environment." The statute also prohibits the manufacture, processing, or distribution in commerce of all PCBs unless the EPA Administrator grants an exemption based on a finding, again through rulemaking, that the desired activity will not result in an unreasonable risk of injury to health or the environment and that "good faith efforts" have been made by the person seeking the exemption to develop PCB substitutes. Totally enclosed PCBs first sold prior to July 1, 1979, for purposes other than resale, however, may be distributed in commerce. 15 U.S.C. § 2605 and 40 C.F.R. Part 761.

1906 GENERATION OF PCB WASTES

A. Activities that generate PCB wastes had until April 4, 1990, to notify EPA and obtain an EPA identification number. After June 4, 1990, it was unlawful for a generator to process, store, dispose, transport, or offer for transportation PCB wastes without an ID number. 40 C.F.R. 761.202 and 761.205.

B. Generators which do not store PCBs owned by others in excess of 500 gallons and which do not operate a regulated PCB storage facility are exempt from the notification requirement. This exemption applies only to notification. These generators must still prepare TSCA manifests to ship PCB wastes. Exempt generators use the generic identification number "40 C.F.R. Part 761" or their EPA/state RCRA ID number on manifests. 40 C.F.R. 761.205.

C. Shipboard labeling, handling, and storing of PCBs and items containing PCBs shall be per Navy Ships Technical Manual (NSTM), Chapter 593, and the NAVSEA Shipboard Management Guide for Polychlorinated Biphenyls (PCBs), NAVSEA S9593-A1-MAN-010. In addition, because many shipboard uses of PCBs are not covered under the PCP regulations, the Naval Sea Systems Command (NAVSEASYS COM) issues PCB Advisories with specific requirements for managing and disposing of shipboard PCBs.

1907 TRANSPORTATION. Any person who moves PCB waste to the property of someone other than the generator is a transporter. Navy activities that transport PCB wastes to another Navy activity or to the Defense Reutilization and Marketing Office (DRMO) are not considered transporters.

A. Virtually all shipments of PCB wastes to a commercial storage or disposal facility must be accompanied by a manifest, i.e., EPA Form 8700-22 or the appropriate state form. Manifests are not required for PCB wastes being shipped to a facility owned by the generator (e.g., a Navy generator need not manifest PCB waste being shipped to DRMO or another Navy activity), nor are manifests required for shipment of PCB wastes having an undiluted concentration of less than 50 ppm. The manifest must contain the generator's ID number. Nonexempt generators in existence prior to February 5, 1990, who made a timely application for an ID number may use the generic ID number until EPA issues them a TSCA ID number or authorizes the use of its RCRA ID number. 40 C.F.R. 761.208.

B. Generators may not relinquish PCB waste to any person who does not have an ID number. Generators sign the manifest, obtain the transporter's signature on the manifest, retain a copy and give the remaining copies to the transporter. Special requirements exist for water and rail shipments. Shipments of PCB waste

not requiring a manifest must nonetheless be recorded by both the generator and the receiving activity on their annual document logs.

C. Dual manifests must be prepared when electrical equipment is shipped off-site for servicing. The term "generator" includes the person who performs the operation himself and the person who hires someone to perform the waste-producing operation with the understanding that the disposal of PCBs will occur. In the latter circumstance, the owner as generator must manifest the PCB containing equipment. The processor must manifest the residual PCBs generated during the servicing process. If the equipment originally manifested by the owner is still regulated after processing, the processor must continue the manifest chain of custody using the original manifest if further shipment of the equipment occurs.

D. Generators must file an exception with the regional EPA office if a signed and completed manifest is not returned from storage or disposal facilities in a timely manner. Commercial storers must respond within 35 days of shipment; disposers, within 45. If a signed copy of the manifest has not been received from the manifest destination and the applicable deadline is ten days away, the generator shall contact the receiving facility to trace the shipment or confirm receipt. 40 C.F.R. 761.215.

1908 STORAGE

A. All activities that store PCBs for over 30 days or operate a PCB storage facility subject to TSCA regulation were required to notify EPA of their PCB waste activity by April 4, 1990. Only one notification is required regardless of the number of storage facilities operated by the facility. 40 C.F.R. 761.65.

B. Each owner or operator of a facility is required to maintain annual records and an annual document log of PCB waste disposal activities if they use or store:

1. At least 45 kg of PCBs in PCB containers at any time;
2. one or more PCB transformers; or
3. 50 or more large PCB capacitors. 40 C.F.R. 761.180.

C. Annual records must include the signed manifests for the calendar year and all Certificates of Disposal. The annual document log will contain specific inventory information for each type of PCB item as listed in the regulations. These records must be retained on site for three years and must be available for inspection during normal working hours. In addition, all Navy facilities which generate, use,

treat, store, or dispose of PCBs must inventory or validate all PCB items and make an annual report to the Naval Facilities Engineering Service Center (NFESC), Port Hueneme, California (formerly NEESA). 40 C.F.R. 761.180.

1909 DISPOSAL

A. The disposer must prepare a Certificate of Disposal for each manifested shipment of PCB waste. The disposer must forward the certificate to the generator within 30 days of disposal. 40 C.F.R. 761.180.

B. Disposal facilities are required to file a one-year exception report when they receive PCB wastes more than nine months after the waste was removed from service. Conversely, generators are required to file exception reports after shipping PCB waste within nine months after removal from service whenever:

1. A Certificate of Disposal is not received from the disposer within thirteen months after PCBs are removed from service; or

2. the Certificate of Disposal received indicates a disposal date more than one year after removal from service. 40 C.F.R. 761.215.

C. To the extent possible, Navy facilities shall use DRMO, the disposal service provided by the Defense Logistics Agency (DLA). Commanders may contract for disposal where essential to mission accomplishment.

1910 SPILL RESPONSE AND REPORTS. Because PCBs are also considered a hazardous substance under CERCLA, spills or releases in excess of reportable quantities under CERCLA section 103 (42 U.S.C. § 9603) must be reported in accordance with National Contingency Plan (40 C.F.R. Part 300) requirements. Any spill of one pound of PCBs must be reported to the National Response Center at (800) 424-8802 or (202) 426-2675. Spills which directly contaminate surface water, sewers, drinking water, or lands used for grazing or agriculture must be reported to EPA within 24 hours. States may impose more stringent requirements. Reporting requirements and cleanup standards are amplified in TSCA regulations at 40 C.F.R. Part 761, Subpart G. Navy hazardous substance release reporting requirements are discussed in greater detail in Chapter 18 of this Deskbook.

1911 ENFORCEMENT. EPA is granted broad enforcement authority under TSCA. 15 U.S.C. §§ 2614, 2615, and 2616 allow for the assessment of civil penalties for a violation of the statute or regulations, as well as authority to seek injunctive relief or seize particular substances. EPA does not have administrative enforcement

authority against Federal facilities under TSCA. 15 U.S.C. § 2606 grants EPA authority to address imminent hazards.

1912 RADON. As added by the 1988 amendments, the Indoor Radon Abatement section of the Toxic Substance Control Act (TSCA) requires Federal agencies to conduct a study of radon levels in Federal buildings. Radon is "the radioactive gaseous element and its short-lived decay products produced by the disintegration of the element radium occurring in air, water, soil, or other media." 15 U.S.C. § 2662(3).

A. **Testing.** Navy housing and buildings occupied over four hours per day must be tested for the presence of radon gas. Based on EPA's scheduling guidelines, all structures with radon levels over four pico-curies per liter (4 pc/l) shall be mitigated.

B. **EPA report.** Each Federal agency will give the results of its study to EPA. EPA will provide a consolidated report on radon levels in Federal buildings to Congress. Based on that input, Congress may pass additional requirements for Federal departments as part of a comprehensive radon abatement program. 15 U.S.C. § 2669.

1913 ADDITIONAL READING. For a detailed examination of PCB regulation, see Captain Marc W. Trost, USAF, *The Regulation of Polychlorinated Biphenyls Under the Toxic Substances Control Act*, 31 A.F. L. Rev. 117 (1989).

1914 SHIPBOARD PCBs COMPLIANCE AGREEMENT. For several years, the Navy and EPA have been negotiating an agreement under Executive Order 12088 to cover the Navy's management and disposal of shipboard PCBs. The agreement is anticipated to cover shipboard releases, ventilation systems maintenance, scrap sales of vessels with PCBs, vessel sales and donations, foreign military sales and leases, and possible target exercises. Actions to transfer vessels to non-Navy parties or to use vessels in target exercises should be coordinated with the Office of the Assistant General Counsel (Installations and Environment) and NAVSEASYSKOM.

CHAPTER XX

ASBESTOS

2001 REFERENCES

- A. The Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 *et seq.*; Asbestos Hazard Emergency Response Act (AHERA) 15 U.S.C. §§ 2641 *et seq.*; 40 C.F.R. Part 763 (Subpart E - Asbestos Containing Materials in Schools)
- B. Clean Air Act (CAA), 42 U.S.C. § 7412; 40 C.F.R. Part 61, Subpart M, §§ 61.140-61.157, National Emission Standard for Asbestos
- C. Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651, *et seq.*; 29 C.F.R. § 1910.1001 (asbestos control in the work place)
- D. Construction Safety Act, 40 U.S.C. § 333; 29 C.F.R. § 1926.58 (asbestos control at construction sites including demolition and renovation)
- E. OPNAVINST 5100.23C, Subj: NAVY OCCUPATIONAL SAFETY AND HEALTH (NAVOSH) PROGRAM MANUAL, Ch. 17
- F. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Chs. 6 and 17
- G. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 6
- H. OPNAVINST 5100.19B, Subj: NAVY OCCUPATION SAFETY AND HEALTH (NAVOSH) PROGRAM MANUAL FOR FORCES AFLOAT (Vols. I, II and III)
- I. SECNAVINST 5212.10A, Subj: MANDATORY RETENTION OF INSULATION / ASBESTOS-RELATED RECORDS

2002 INTRODUCTION. Asbestos is the generic term for a family of naturally fibrous minerals, including chrysotile, amosite, crocidolite, anthophyllite, tremolite, and actinolite. Asbestos is regulated in various ways by federal and state

statutes because of its harmful effects on human health as a cause of asbestosis, mesothelioma, and other cancers. Because of the ease with which it can get particles airborne, friable asbestos is a primary concern. As used here, "friable" means the asbestos can be crumbled, pulverized, or reduced to a powder by hand pressure. Nonfriable asbestos-containing material (ACM), which may become friable during handling, is also regulated under 40 C.F.R. §§ 61.140 *et seq.* Amendments and modifications to 40 C.F.R. § 61 occur frequently; updates should be checked.

2003 REGULATION. The extent of regulation as applied to federal facilities, which may includes ships in port, will vary with the particular asbestos activity, whether the statute was enacted by Congress or the state, whether sovereign immunity was waived for that brand of regulation, and whether the field has been preempted by federal regulation.

A. **Clean Air Act (CAA).** The CAA identifies asbestos as a "hazardous air pollutant" (i.e., an air pollutant that may result in increased mortality or serious irreversible illness). As such, asbestos is subject to specific controls under the National Emission Standards for Hazardous Air Pollutants (NESHAP).

1. Section 313 of the CAA contains an extremely broad waiver of sovereign immunity. Federal agencies, and their officers and agents, are subject to all federal, state, and local requirements, whether substantive or procedural; exercise of administrative authority; and any process or sanction.

2. Generally, states can develop their own air pollution program so long as it is at least as stringent as the federal program. The CAA preempts the field, however, in the areas of automobile emission standards, fuels, and aircraft. States can also administer the federal program through a State Implementation Plan (SIP) approved by the Environmental Protection Agency (EPA).

3. The extent of permissible state regulation of asbestos under the CAA depends on the method of implementation. If the state regulation is a facet of NESHAP enforcement under a SIP, the federal standard controls. If regulated as an independent program, the state can be more stringent than the federal program on asbestos. This may result in state licensing requirements and certification of federal employees but only to the extent it goes toward control and abatement of air pollution.

4. The asbestos NESHAP at 40 C.F.R. Part 61, Subpart M, is applicable to both Navy shore facilities and ships in port.

B. **Occupational Safety and Health Act (OSHA).** The provisions of OSHA are designed to protect workers handling asbestos. OSHA standards apply to

military and civilian DOD employees as well as defense contractors. Federal laws preempt state action on worker safety to the extent that the state cannot apply laws that are less stringent than federal standards. States may adopt more stringent regulations to promote their legitimate interest in worker safety. These more stringent requirements will not be directly applicable to Federal agencies, however, because sovereign immunity was not waived under OSHA. Thus, states cannot require certification of federal employees under OSHA.

C. **Toxic Substances Control Act (TSCA).** As a public safety statute, TSCA controls the manufacture and distribution of hazardous chemical substances or mixtures under the commerce clause.

1. The Asbestos Hazard Emergency Response Act of 1986 (AHERA) amended TSCA. AHERA is the only asbestos statute which requires abatement. This requirement applies only to schools serving grades kindergarten through high school. EPA estimated that friable asbestos existed in 31,000 schools. AHERA applies to schools on DOD installations. Regulations appear at 40 C.F.R. Part 763, Subpart E. AHERA also established the requirement that the abatement work be performed by accredited contractors and adopted the EPA Guidebook (the "Purple Book") into law.

2. States have an interest under AHERA as the statute requires states to develop and implement accreditation programs based upon the EPA model. Sovereign immunity has not been waived under TSCA. Consequently, states cannot control federal employees under a general environmental health statute.

3. Other federal buildings are addressed only to the extent that EPA was directed to conduct a study and make recommendations to Congress. EPA did the study and recommended a program for asbestos abatement in public buildings similar to that for schools.

D. **Resource Conservation and Recovery Act (RCRA).** RCRA controls generation, treatment, storage, and disposal of hazardous waste. As discussed more fully in Chapter 15 of this Deskbook, RCRA allows states to develop their *own* program so long as it is at least as stringent as the federal program. Asbestos waste is not a listed RCRA hazardous waste; however, a number of states regulate asbestos as a hazardous waste under the state RCRA program. The applicable state program should be consulted.

1. Under RCRA's waiver of sovereign immunity, Federal agencies are subject to and must comply with *all* federal, state, and local requirements, both substantive and procedural, respecting control and abatement of hazardous waste, to the same extent as any person. Consequently, states can regulate Federal facilities

by operating an approved state program *in lieu* of the federal program or through operation of a parallel state program *in addition* to RCRA.

2. Under this authority, states could impose treatment requirements (i.e., the neutralization of hazardous materials or rendering such materials safer for transportation). In connection with asbestos, states could regulate the wetting, bagging, and mixing process as a form of treatment. Similarly, states could require certification of federal employees under RCRA, but only within the confines of the subject matter of that statute (i.e., treatment, storage, or disposal of hazardous waste).

E. ***Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)***. CERCLA controls the cleanup of hazardous waste sites, including those contaminated by asbestos. Asbestos is a hazardous substance under CERCLA by virtue of the incorporation of hazardous air pollutants under CAA in CERCLA section 101. State regulation may exist in this arena as it may under RCRA.

2004 MANAGING ASBESTOS ABATEMENT ACTIONS. Abatement is the term used to describe remediation of asbestos hazards by removal, airtight enclosure, or encapsulation with a sealant.

A. ***Planning***. State and local requirements should be consulted before drafting contract specifications. Planners should pay particular attention to: air pollution control (***notification***, permits, licensed contractors, etc.); worker protection limits; testing and sampling procedures; and disposal requirements. Carefully evaluate current exposure levels and estimate maximum exposure levels. Faulty sampling procedures or estimation techniques prior to preparing contract statements of work may result in an underestimation of asbestos exposure levels. This can be an expensive error, leading to increased work, higher contract costs, and potential claims from employees exposed to excessive asbestos. An interim final rule took effect on April 4, 1994, and was published in the Federal Register on February 3, 1994, setting forth EPA's revised Model Accreditation Plan (MAP) describing accreditation requirements for asbestos abatement workers and their supervisors.

B. ***Notification***. Under NESHAP, 40 C.F.R. § 61.145, owners and operators must notify EPA in advance of asbestos abatement activities. A release of asbestos in excess of its reportable quantity, found at 40 C.F.R. § 302.4, requires notification.

1. For renovation activities, the federal threshold is 260 feet of pipe or 160 square feet or 35 cubic feet of surface area. At least ten days' notice is required for demolition of facilities exceeding the threshold. Notice should be given

as soon as possible in demolition operations, but at least ten days before work begins. Failure to make required notifications may result in administrative fines.

2. Asbestos abatement actions may be subject to evaluation requirements under the National Environmental Policy Act (NEPA). In that connection, paragraph 5-4.2(15) of OPNAVINST 5090.1A provides for a categorical exclusion for asbestos abatement projects provided the building is neither on, nor eligible for, listing on the National Register of Historic Places (NRHP).

C. **Worker protection.** Workers must be properly trained, equipped, and medically certified. Training prescribed in 29 C.F.R. § 1926.58, includes instruction in the use of protective equipment, removal and disposal techniques, and emergency procedures.

D. **Work Site inspection.** The work site should be inspected several times daily by someone with the requisite expertise to evaluate compliance with 40 C.F.R. § 61.14 and 29 C.F.R. § 1926.58. The duty to ensure work practices are being observed should rest on a single responsible expert rather than a vague set of people who may drop by. This inspector should ensure the workers are properly maintaining containment barriers or bags and wearing coveralls, respirators, and other protective equipment. Adequate worker changing and decontamination facilities must be available. The inspector should stop the abatement work immediately if any condition appears hazardous.

E. **Disposal.** Per 40 C.F.R. § 61.150, proper wetting, handling, transport, and disposal techniques must be employed. The asbestos is wetted down to prevent release of particles into the air during the removal process. The asbestos is bagged while wet into leak-proof bags. Bags and transport equipment must be properly labeled. Paragraph 17-5.4.2.d of OPNAVINST 5090.1A, echoes these requirements for asbestos material removed during shipboard ripouts or repair actions afloat. See also OPNAVINST 5100.19B. Pursuant to 40 C.F.R. § 61, waste asbestos is to be manifested for disposal on a waste shipment record.

F. **Work completion.** There is no "substantial compliance" until the work site is clean. The work site must pass visual inspection for abatement completion and freedom from dust. In addition, the work site must pass a test for airborne asbestos, revealing less than 0.01 fibers per cubic centimeter using phase contrast microscopy (PCM).

G. **Records retention.** SECNAVINST 5212.10A requires all asbestos-related records to be retained under further notice. An annual asbestos records report is required to be submitted to Commander, Naval Sea Systems Command (COMNAVSEASYS COM).

2005

CONTRACTING FOR ASBESTOS ABATEMENT

A. **Selecting a contractor.** The gravity of asbestos abatement actions dictate that we select contractors carefully. In the long term, the most cost-effective contractor may not be the low bidder. Draft precise contract specifications to ensure compliance with applicable abatement regulations. Include contract provisions requiring the contractor to comply with all notification, permit, and license requirements imposed by law. Check the contractor's references and insurance coverage. Conduct interviews and request assurances in writing. The contract should specify explicit contractor liability for fines resulting from employee violations as the CAA waiver of immunity may extend to fines. Alternatively, consider contract provisions calling for the contractor to indemnify the government for any penalties we pay.

B. **Certification of contractors.** States could require any contractor operating in that state to be certified to the same extent as federal employees under state, air, or hazardous waste laws. By contrast, states attempting to require contractor certification under general public safety laws have exceeded their authority. Consequently, the only rub would occur when the Federal agency hired an unlicensed contractor for asbestos removal in a state requiring certification in reliance on a general public safety law. We would likely win a Pyrrhic victory if challenged, recognizing the time, money, and bad publicity such litigation would generate. The state would no doubt take corrective action to bring the certification under the auspices of an air pollution or hazardous waste control law. Voluntary compliance by ignoring the technicality is probably the better course, given the enhanced visibility of compliance earned with these training dollars and the dubious long-term benefit of throwing business at a class of uncertified contractors.

2006 TRANSFER OF PROPERTY CONTAINING ASBESTOS. Under CERCLA § 107, the Navy may be liable as a past owner of a hazardous disposal site if we sell or transfer property which contains asbestos and that asbestos is later released to the environment.

A. As stated above, asbestos is a hazardous substance under CERCLA, defined by reference to hazardous air pollutants under the CAA. Future owners who are not aware of the presence of asbestos prior to purchase are likely to seek contribution from all potentially responsible parties (PRPs) and the government tends to be an attractive defendant.

B. As to structures, the Navy may avoid or minimize liability if the transfer is not for disposal and we reasonably believe the buyer will use the building with the asbestos intact. If those circumstances exist, we must evaluate and record the buyers stated intent. The building must be transferred intact with the asbestos not friable

or likely to become so during the transfer. The documents must record the decision and preserve the administrative record against potential litigation in the future.

2007 ASBESTOS PRODUCTS. Subpart I of 40 C.F.R. § 763, prohibits the manufacture, importation, processing, and distribution in commerce of various products containing asbestos. These prohibitions become effective in stages regarding both the activity and the product type. Exemptions to these prohibits appear at 40 C.F.R. § 763.173.

2008 ADDITIONAL INFORMATION

A. **EPA.** EPA maintains a TSCA Information Hotline (Washington, D.C.), (202) 554-1404, which provides asbestos information. They also will provide, at request, a number of useful publications which can be ordered:

1. Asbestos Fact Book. EPA Office of Public Affairs.
2. Guidance for Controlling Asbestos-Containing Materials in Buildings. EPA 56-/5-85-018.
3. Asbestos Facts: Demolition and Renovation Regulations
4. Asbestos in Buildings: Guidance for Service and Maintenance Personnel. EPA 560/5-85-018.
5. Asbestos in Buildings: National Survey of Asbestos-Containing Friable Materials. EPA 560/5-84-006.
6. Environmental Hazards in Your Schools
7. O & M: Managing Asbestos in Place (known as "the green book")
8. Asbestos in Buildings: Simplified Sampling Scheme for Friable Surfacing Materials. EPA 560/5-85-030a.
9. A Guide to Respiratory Protection for the Asbestos Abatement Industry. EPA-560-OPTS-86-001.

B. **Training.** The Naval Safety School offers a course entitled "Shipboard Asbestos Emergency Response" for ships' asbestos response team members.

Consolidated Environmental Law Deskbook

C. **NFESC.** Subscribe to the Naval Facilities Engineering Service Center (NFESC) newsletter, "Indoor Air Monitor," by writing to NFESC, 560 Center Drive, Port Hueneme, CA 93043-4328.

2009 GUIDE SPECIFICATIONS. Guide specifications for asbestos abatement projects may be obtained from the following sources:

A. Federal Construction Guide Specifications (FCGS): 02085. Asbestos Abatement Procedures.

B. GSA Guide Specifications PBS (PCD): 02085. Asbestos Abatement Procedures.

C. Army Corps of Engineers Pattern Guide Specification for Military Construction: OD 02080--Asbestos Removal and Disposal.

D. Association of Wall / Ceiling Industries—International, Inc., Guide Specifications for the Abatement of Asbestos Release from Spray-or Trowel-Applied Materials in Buildings and other Structures. December 1981. The Foundation of the Wall and Ceiling Industry, 25 K Street, N.E., Washington, D.C. 20002.

CHAPTER XXI

OIL POLLUTION

2101 REFERENCES

- A. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601 *et seq.*
- B. Clean Water Act (CWA), 33 U.S.C. § 1321
- C. Oil Pollution Act of 1990 (OPA 1990), 33 U.S.C. §§ 2701 *et seq.*
- D. National Oil & Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300
- E. Executive Order 12580, (Superfund Implementation (reprinted at 42 U.S.C. § 9615 at 179 (West Supp 1990)). 52 Fed. Reg. 2923 (23 Jan 1987)
- F. DOD Directive 5030.41 of 1 June 1977; Subj: OIL AND HAZARDOUS SUBSTANCES POLLUTION PREVENTION AND CONTINGENCY PROGRAM PLANNING
- G. DOD Instruction 6050.15, Subj: PREVENTION OF OIL POLLUTION FROM SHIPS OWNED OR OPERATED BY THE DEPARTMENT OF DEFENSE
- H. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCE PROGRAM MANUAL, Chs. 12 and 17
- I. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 11 and App. G
- J. MCO P11000.8, *Real Property Facilities Manual*
- K. EPA regulations on oil discharge, 40 C.F.R. § 110

- L. Reportable quantities of hazardous substances, 40 C.F.R. § 117

APPENDIX

- (A) Oil Spill Report, (Reprinted from OPNAVINST 5090.1A, App. G)

2102 NATIONAL CONTINGENCY PLAN (NCP). The Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) required the President to prepare and publish the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and assign responsibilities among the Federal agencies. Executive Order 12,580 assigned responsibilities and directed EPA to prepare and publish the NCP. The NCP provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants. The NCP applies to discharges of oil in navigable U.S. waters, the contiguous zone, and on the high seas in connection with certain outer continental shelf activities, deep water port activities, and ocean fisheries. The NCP will, in all likelihood, be amended to designate Federal natural resource trustees under CERCLA, Oil Pollution Act of 1990 (OPA), and the CWA.

2103 NCP ORGANIZATION. The NCP is organized in three tiers: National Response Team (NRT); Regional Response Teams (RRTs); and predesignated On-Scene Coordinators (OSCs).

A. The NRT consists of fourteen (14) Federal agencies—including DOD. The team is chaired by EPA. The RRT is the response network comprised of Federal and state representatives. There is an RRT for each of the ten EPA regions, one for Alaska, one for Hawaii and the Pacific territories, and one for territories in the Caribbean. The NRT and the thirteen (13) RRTs are policymaking and coordinating bodies.

B. The federally predesignated OSCs direct response efforts and coordinate all other efforts at the scene of a release. The Coast Guard has designated the OSCs for oil spills in coastal areas; the EPA, for oil spills in inland areas. Under the NCP, other Federal agencies play roles as well. The NCP specifically designates DOD as the OSC for spills happening solely within their areas of jurisdiction. See 40 C.F.R. § 300.175(b)(4). Accordingly, for hazardous substance releases from Navy vessels and facilities, the Navy has designated Navy OSCs or NOSC. The fleet NOSC are the numbered fleet commanders. Shoreside NOSC are designated by the Area Coordinators, and are normally the Regional Environmental Coordinators (RECs).

The OSCs must develop contingency plans to fulfill their duty to direct pollution response efforts within their area of responsibility.

2104 OIL SPILLS

A. *Spill contingency plan*

1. ***Ships.*** Ships are required to develop an Oil Spill Contingency Plan (SCP) consistent with the pertinent fleet SCP and per guidelines to be established by Commander, Naval Sea Systems Command (COMNAVSEASYS-COM). The ship's oil SCP may be promulgated in conjunction with the ship's hazardous substance SCP, i.e. an oil or hazardous substance (OHS) SCP. The SCP will contain procedures regarding reporting, control, containment, control, recovery, and disposal. OPA 1990 contains requirements for "tank vessel" oil spill contingency plans. Many states are adopting similar measures. Note that, because OPA 1990 does not waive immunity for public vessels, Navy vessels are considered exempt from this requirement. However, Navy policy is that the plans required by Navy instruction will be submitted to the state as a courtesy, but fees associated with public vessel plan submissions will not be paid.

2. ***Shore facilities.*** Following passage and implementation of OPA 1990, most states also have a contingency plan requirement for shore activities. For shore installations, oil spill contingency plans are considered a legitimate requirement under the CWA's waiver of immunity. Counsel must be cognizant that there is still considerable question over the extent of the CWA's immunity provision. Assertion of any new requirement should be coordinated through the local REC, and, if need be, through the Area Coordinator and Office of Assistant General Counsel (Installations and Environment) (OAGC(I&E)).

3. ***OPA 1990.*** The changes mandated by OPA 1990, which also amended section 311 of the Clean Water Act (42 U.S.C. § 1321), will require certain levels of contingency planning at the Federal level. Area Committees are designated as the heart of an area-level planning and coordination structure designed to supplement existing national, regional, state, and local contingency planning efforts. Pursuant to Executive Order 12777 (56 FR 54,757, Oct. 18, 1991), EPA and the Coast Guard were delegated responsibilities for designating inland and coastal areas respectively. Each is also responsible for appointing the requisite committees therein. These committees will be required to develop Area Contingency Plans.

B. ***Spill response.*** Shipboard personnel must be trained and prepared to take immediate action to mitigate the effects of a spill. To that end, COMNAVSEASYS-COM has developed a shipboard oil spill containment and cleanup kit for quick response first aid capability. The commanding officer (CO) will

immediately make the requisite notifications in accordance with the local Senior Officer Present Afloat (SOPA) instructions or NCP and state requirements. When the spill exceeds the ship's response capability, the CO will notify the Navy On-Scene Commander (NOSCDR) who will mobilize assets and direct response actions.

1. ***Shore-Based On-Scene Operations Teams (OSOTs)***. OSOTs are trained personnel with specialized equipment to contain OHS spills. Their primary function is to respond to port spills.

2. ***Supervisor of Salvage (SUPSALV)***. SUPSALV maintains spill response assets to support NOSCs in offshore spill operations. These assets are positioned throughout the United States and overseas to provide fast response and technical support. SUPSALV also fulfills the Navy duty to assist in the containment of significant non-DOD spills.

2105 SPILL REPORTING. In addition to taking appropriate actions to mitigate the effects of the spill, commanders must notify certain activities when the spill exceeds reportable quantities. For oil, the reportable quantity means enough to cause a sheen on the surface of the water, a discoloration of the water, or sludge on the shore. See 40 C.F.R. Part 110 for further guidance.

A. ***All spills.*** The commander must notify the cognizant Navy On-Scene Coordinator (NOSC). The numbered fleet commanders are predesignated as fleet NOSCs and will be notified by message. Shoreside NOSCs will be notified by the most expeditious means, followed up by message. The message format is specified in Appendix G of OPNAVINST 5090.1 and is reproduced in the appendix of this chapter.

1. ***Precedence.*** Oil spill messages will normally be by routine precedence provided prior telephone report has been made. If a telephone report has not been made, use priority precedence.

2. ***Classification or special handling marking.*** Typically, spill reports are unclassified and do not warrant special handling markings. Avoid including classified or sensitive unclassified information to the maximum extent possible unless this information is necessary to understand and respond to the situation.

B. ***Contiguous zone spills.*** If the spill occurs within the 12 nm contiguous zone of the U.S. coastline, the CO will also notify the National Response Center (NRC) at (800) 424-8802. Many states have notification requirements as well.

C. ***Spills in foreign waters.*** Consult local regulations, Status of Forces Agreement (SOFA), etc., regarding the possible requirement to notify any country that has potential to be affected by an hazardous material / hazardous waste (HM / HW) spill in foreign or international waters. Be particularly careful when responding to damages, claims, or other requests for payment. Warships normally do not pay fines or damages to a foreign government; rather, the matter is handled as a claim. Coordination with the overseas area or regional coordinator, the unified CINC, or the host nation executive agent under applicable DOD overseas restoration policy should always take place.

D. ***Environmentally significant spills.*** If the spill is "environmentally significant," the initial reporting shall be made using the OPREP-3 system under OPNAVINST 3100.6, Subj: SPECIAL INCIDENT REPORTING (OPREP-3, NAVY BLUE AND UNIT SITREP) PROCEDURES. An environmentally significant spill is one which: results from catastrophic events; could cause significant adverse public reaction; could have geopolitical implications; or otherwise warrants OPREP-3 special incident reporting. The OPREP-3 report will be followed up by the amplifying message report discussed above.

E. ***State and local reporting requirements.*** In assessing any spill or potential for any spill, care must be taken to meet applicable state and local requirements. Most states have a requirement for notification which roughly corresponds to the NRC notification required by the NCP. RECs should be consulted on this question.

F. ***Natural resource damage assessments.*** OPA 1990 joins CERCLA and the CWA section 311 in requiring trustees of natural resources to assert and attempt recovery of natural resource damages. Natural resource damages are over and above response costs, and are intended to restore the damaged area or replace the resource. The Interior Department is responsible for setting the damages policies under CERCLA, and National Oceanic and Atmospheric Administration (NOAA) (Department of Commerce) has those responsibilities under OPA 1990. The measure of damages under CERCLA has been the subject of considerable litigation; the lead case is *Dep't of Interior v. Ohio*, OPA 1990 legislative history makes it clear that the damages scheme was to follow that of CERCLA and the *Dep't of Interior v. Ohio* case. Counsel should ascertain who the Federal and state trustees are, and obtain copies of the assessment policies. In some instances, DOD may be the Federal trustee, particularly of resources aboard shore installations. Further information is available from CNO N45J, LANTFLT N02LE, and PACFLT N45J.

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APPENDIX A

**OIL SPILL REPORT
(MESSAGE OR NAVGRAM FORMAT)**

FM: NAVY ACTIVITY/SHIP (Spiller)
TO: NOSC/NOSCDR (See Chapter 11 or 17 of OPNAVINST 5090.1A)
OPERATIONAL COMMANDER

INFO: CNO WASHINGTON DC//45//
NEESA PORT HUENEME CA//112//
COMNAVSEASYS COM WASHINGTON DC//OOC//

If the oil release occurs within the United States and its 12 nm contiguous zone, add the following info addressee:

COGARD NATIONAL RESPONSE CENTER WASHINGTON DC//JJJ//

UNCLAS//NO5090//

SUBJ: OIL SPILL REPORT (REPORT SYMBOL OPNAV 5090-2)
(MIN: CONSIDERED)

MSGID/GENADMIN/ORIGINATOR//

RMKS/

1. GMT DTG RELEASE OCCURRED/DISCOVERED.
2. ACTIVITY/SHIP ORIGINATING RELEASE:

For ships, list: name, hull number, and UIC. For shore activities, list: name, UIC. For Navy releases that occurred during transportation, list: name of activity responsible for shipment. For non-Navy releases discovered by the Navy, list the name of responsible party. If from a commercial firm under contract to Navy, list the names of the firm and the contracting activity. If the source of the spill is unknown, indicate whether the spill is thought to have originated from Navy operations.

3. SPILL LOCATION:

For releases at sea, list: latitude, longitude, and distance to nearest land. For releases in port, list port name and specific location (e.g., pier, mooring, etc.). For releases ashore within the activity, specify the exact location (e.g., building number, area designation, etc.). For releases during transportation, give exact location (e.g., highway and miles from nearest city or street name, number, and city).

4. AMOUNT SPILLED IN GALLONS:

This may be the best estimate. If an oil / water mixture was spilled, indicate the percentage of oil.

5. TYPE OF OIL SPILLED:

Choose one: diesel fuel marine (DFM); naval distillate; Navy special fuel oil (NSFO); jet fuels (JP-4, JP-5); aviation / automotive gasoline; automotive diesel; heating fuels (grades 1 and 2, kerosene); residual burner fuel (grades 4, 5, and 6 / bunker C); lube / hydraulic oils, oil/ oil mixture (including slop and waste oils); oil / water mixture (including bilge waste); other (specify); unknown (provide best estimate, if possible).

6. OPERATION UNDER WAY WHEN SPILL OCCURRED:

Choose one: fueling / defueling; internal transfer of fuel (includes transport of fuel from one storage area to another); bilge dewatering (including donut operations); salvage; other (specify); unknown.

7. SPILL CAUSE:

This section should provide a narrative description of specific spill cause. Indicate whether the principal cause was: structural failure (specify); hose failure or leak; other type equipment failure (specify); collision / grounding / sinking; valve misalignment; monitoring error; other procedural / communications error (specify); other (specify); unknown.

8. SLICK DESCRIPTION AND MOVEMENT:

This paragraph should indicate: size (length and width); color (choose one: barely visible, silvery, faint color, bright color bands, dull brown, or dark brown); on-scene wind (direction and speed); sea state; and slick movement (direction and speed).

9. AREAS DAMAGED OR THREATENED:

This paragraph should identify: the name of the body of water affected; nature and extent of damage to property, wildlife, or other resources (if any); and areas or resources threatened.

10. TELEPHONIC REPORT TO NRC WAS/WAS NOT MADE.

11. SAMPLES WERE/WERE NOT TAKEN.

12. CONTAINMENT METHOD PLANNED/USED:

This paragraph should indicate which of the following containment equipment was or will be used: boom; ship's hull; camel; water spray; chemical agent (specify); other (specify). If none, state reason.

13. SPILL REMOVAL METHOD PLANNED/USED:

This paragraph should indicate which of the following removal equipment was or will be used: DIP 1002 skimmer; DIP 3002 skimmer; SLURP skimmer; absorbents (oil-absorbing pads, chips, or other materials); dispersants; vacuum trucks / pumps; other (specify). If none, state reason.

14. PARTIES PERFORMING SPILL REMOVAL:

This paragraph should indicate one or more of the following: Navy (specify lead organization in charge); commercial firm under contract to Navy; USCG; EPA; state or local agency; other (specify).

15. ASSISTANCE REQUIRED/ADDITIONAL COMMENTS.

16. ACTIVITY CONTACT FOR ADDITIONAL INFORMATION: //

Specify the point of contact's name, code, and DSN and/ or commercial telephone number.

CHAPTER XXII

SHIPBOARD ENVIRONMENTAL PROTECTION

2201 REFERENCES

- A. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCE PROTECTION MANUAL, Ch. 17
- B. OPNAVINST 1920.1B, Subj: OCCUPATIONAL SAFETY & HEALTH MANUAL
- C. *Naval Ship's Technical Manual*, Ch. 593, Pollution Control
- D. CNO ltr 5090 Ser N45J/3U593972 dtd 26 Apr 93, Navy Ship Discharge Policy in U.S. Territory
- E. CNO 061610Z DEC 93, Subj: SOLID WASTE DISPOSAL AT SEA
- F. United Nations Law of the Sea Convention (UNCLOS)
- G. Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*
- H. Exclusions to EPA's NPDES Permit Program, 40 C.F.R. § 122.3
- I. Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901 *et seq.*
- J. CNO 151808Z OCT 91, Subj: STATE APPROVAL OF PUBLIC VESSEL OIL SPILL CONTINGENCY PLANS

APPENDIX

- (A) Major Federal Environmental Statutes Applicable to Vessel Pollution

2202 GENERAL

A. Providing legal advice regarding vessel pollution control can be particularly challenging. Because vessels are mobile, vessel environmental questions sometimes arise in jurisdictions with which Navy attorneys are not familiar. Because

vessel environmental questions often involve unavoidable shipboard waste streams, such as sewage and graywater, there is particular urgency in resolving such issues. Vessel environmental issues with the potential to disrupt port visits or operations attract immediate, high level attention within the Navy chain of command. Attorneys addressing vessel environmental issues must act swiftly, but in full coordination with the legal and operational chains of command.

B. Substantive requirements applicable to naval vessel pollution control are contained in references (a) through (e). The standards contained therein are not repeated in this chapter, since to do so would introduce the possibility of error. Counsel seeking substantive guidance should consult the primary resources. This chapter focuses on the legal underpinnings of the substantive guidance, and on procedures for addressing specific problems as they arise.

2203 SOURCES OF VESSEL ENVIRONMENTAL REQUIREMENTS.

United States Navy vessels operate worldwide. The legal and policy regimes applicable to vessel pollution control varies with location. As discussed below, there exist at least five sources of environmental law and / or policy that determine pollution control requirements for naval vessels.

A. **Foreign nation law.** Under Article 211 of reference F, coastal and port states have certain authority to prescribe vessel pollution control standards for ships operating in the state's exclusive economic zone (EEZ) and territorial sea, or calling in the state's ports. Under both customary international law and Article 236 of reference F, however, coastal and port states lack authority to enforce environmental regulations against another state's sovereign immune vessels—such as warships. Where a foreign state's warships violate a coastal or port state's pollution control requirements, the remedy is to require the offending vessel to leave the coastal or port state's territory. Although not strictly subject to foreign state environmental requirements, as a policy matter U.S. warships endeavor to operate within the host state's guidelines. CNO and Fleet Commander guidance should be consulted for current policy in this area.

B. **Status of Forces Agreements (SOFAs).** The United States has negotiated agreements with a number of foreign countries regarding the conditions under which U.S. military forces will be present in the foreign state. Although most SOFAs do not specifically address vessel pollution control requirements, the SOFA and any ancillary agreements or understandings should be consulted as a possible source of vessel environmental requirements.

C. **Customary and conventional international law.** While operating beyond the territorial jurisdiction of any nation, vessels are subject to pollution control requirements of customary international law, and to requirements of

international conventions or agreements to which the flag state is a party. Customary international law, and all conventions and agreements on vessel pollution to which the United States is a party, provide that vessel pollution control requirements do not apply to sovereign immune vessels such as Navy ships. In some cases, however, the United States has elected to make substantive international requirements fully applicable to U.S. public vessels, including naval vessels. The key point is that international requirements regarding vessel pollution control apply to U.S. naval vessels only to the extent provided for by Congress. Consequently, compliance with U.S. law applicable to naval vessels will result in compliance with applicable requirements of international law.

D. ***United States Federal law and regulation.*** Federal environmental law and regulation establish numerous requirements applicable to vessels. Appendix A discusses the major Federal environmental laws that apply to vessels in general. As indicated in Appendix A, many of these requirements do not apply, or apply in a different manner, to "public vessels." In such situations, DOD and / or Navy policy generally impose equivalent environmental protection requirements. CNO and Fleet Commander guidance should be consulted to ascertain such policy requirements.

E. ***State and local environmental law and regulation.*** As a general proposition, state and local environmental requirements apply to Federal entities (including naval vessels) only to the extent provided in the applicable sovereign immunity waiver provision if any. Chapter 2 of this deskbook discusses the application of Federal sovereign immunity waivers. These waivers must be considered in context with the sometimes separate treatment accorded U.S. public vessels under Federal environmental law.

2204 VESSEL INSPECTIONS

A. ***Legal requirements.*** In general, Federal law empowers environmental officials to enter and inspect any premises necessary to carry out their regulatory or enforcement functions. Waivers of Federal supremacy contained in Federal environmental statutes, in general, mandate Federal entity cooperation with environmental inspectors. The apparently broad environmental inspection authority is significantly narrowed where Navy vessels are concerned. As indicated in enclosure (3), in some cases Federal law exempts public vessels from regulatory regimes, or makes the Secretary of Defense the de facto regulator. In these areas, inspectors seeking access to Navy ships would be unable to demonstrate an official interest in the area to be inspected. Additionally, as indicated in enclosure (3), in some areas Federal law specifically exempts public vessels from boarding and inspection for environmental enforcement purposes.

B. **CNO policy.** Paragraphs 1-5.9, 1-5.10, and 17-5.2 of reference A discuss CNO policy relative to inspection of vessels by environmental authorities. In general, this policy provides that environmental officials having an official interest in the area to be inspected will be afforded access to Navy ships, consistent with the requirements of national security. To ensure consistent application of the CNO policy, requests to board and / or inspect vessels should be coordinated with the cognizant Regional Environmental Coordinator (REC) and Fleet Commander.

2205 DISCHARGES TO WATER WITHIN U.S. TERRITORY

A. **CWA requirements.** The most frequently encountered shipboard environmental issue pertains to in-port discharges incidental to the normal operation of vessels. Such in-port discharges typically include graywater (in certain class of ships), effluent from oil-water separators, cooling water, boiler blowdown, ballast water, and weather deck and deck drain runoff. Reference G establishes the National Pollution Discharge Elimination System (NPDES) permit program for discharges from "point sources." The Reference G "point source" definition includes vessels. Reference H, a U.S. EPA NPDES regulation, provides that:

The following do not require NPDES permits:

- (1) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation . . ."

Although excluded from NPDES permitting, environmental regulators occasionally attempt to assert regulatory authority over vessel discharges under state permit programs, or by arguing that vessels in-port are not being used as a means of transportation. Reference D to this chapter discusses procedures for responding to such regulatory interest.

B. **Uniform national discharge standards.** In January of 1994, the Clinton Administration recommended an amendment to the CWA which would result in the establishment of effluent standards for significant discharges from DOD vessels. The Navy considers the establishment of such standards a desirable way in which to resolve existing legal ambiguity regarding the extent to which vessel discharges can be regulated. Information on this initiative has proven helpful to Navy installations and RECs in discussing ship discharge issues with regulators.

Current information on national discharge standards is available from CNO N45.

2206 VESSEL AIR EMISSIONS. Vessels generate a variety of air emissions, including propulsion plant and auxiliary diesel exhaust, evaporation during refueling, paint fumes, hazardous material evaporation during use, and others. As discussed in Chapter 11, such emissions are extensively regulated ashore. As discussed below, the application of shore-facility-oriented regulations to vessel emissions is not well settled.

A. **Federal law.** The Clean Air Act (CAA) waiver of sovereign immunity (42 U.S.C. § 7418) provides that Federal agencies having jurisdiction over any "property or facility" which may result in the discharge of air pollutants . . . shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity." CAA substantive regulatory programs, however, do not expressly address vessel discharges. As mobile equipment, vessels do not appear to meet the definition of "stationary source," to which the stationary source requirements of 42 U.S.C. § 7411 apply. The extensive regulatory program for hazardous air pollutants under CAA section 112, 42 U.S.C. § 7412, also applies to "stationary sources." Under the mobile source category, the CAA regulates motor vehicle emissions, motor vehicle fuel, and aircraft, 42 U.S.C. §§ 7521-7574, but does not specifically address vessels.

B. **State and Federal implementation plans.** As discussed in Chapter 11, the CAA relies heavily upon geographic-unique regulatory programs, called implementation plans, to achieve the Act's objectives. Plans developed by states are called State Implementation Plans (SIPs); plans developed by the U.S. EPA are Federal Implementation Plans (FIPs). Beyond certain minimum requirements, the specific regulatory requirements of SIPs or FIPs are left to regulator discretion. Thus far, implementation plans have not extensively addressed emissions from vessels. As air quality standards are ratcheted down, however, emission sources that heretofore have not been comprehensively regulated, such as vessel air emissions, are receiving increasing attention.

C. **Legal advice regarding vessel air emission regulation.** Where vessel air emission regulation is concerned, definitions are of paramount importance. Counsel must carefully scrutinize statutory and regulatory definitions, including reference to legislative or regulatory history, to ascertain whether regulation of vessel emissions was intended. To avoid establishing an undesirable precedent in this unsettled area of the law, counsel must also ensure that advice in this area is coordinated with legal and operational chains of command.

2207

SHIPBOARD SOLID WASTE PROGRAM

A. *Annex V to the International Convention on the Prevention of Pollution from Ships* (MARPOL) imposes various requirements on solid waste disposal from ships. MARPOL is implemented in the United States by the Act to Prevent Pollution from Ships (APPS), Reference I. As discussed below, the FY 1994 Defense Authorization Act (DAA) amended APPS section 1902 to impose short-term plastics retention requirements on Navy ships, and longer-term requirements for shipboard technology development and installation. Counsel providing legal advice regarding shipboard solid waste discharges at sea should be fully aware of MARPOL Annex V, APPS, and current CNO and Fleet Commander requirements.

B. *Plastics retention, and discharge reporting requirements.* APPS section 1902, as amended by the FY 1994 DAA incorporated into Federal law preexisting Navy plastic retention policies. The Act also imposed certain requirements for reporting of discharges in special areas which discharges do not conform to the requirements of MARPOL Annex V. Reference E, which will be incorporated into reference A, discusses these retention and reporting requirements.

C. *Technology development requirements.* APPS section 1902, as amended by the FY 1994 DAA, establishes various deadlines for compliance with Annex V requirements by Navy surface ships and submarines. Pursuant to APPS section 1902, through the year 1998 the Navy will be installing plastic processors on all surface vessels that require such devices to achieve zero discharge of plastics at sea. Also pursuant to section 1902, the Navy is reviewing other technologies that will enable submarines to achieve zero discharge of plastics, and enable surface ships and submarines to achieve a food-waste-only discharge standard in designated "special areas" of the world.

APPENDIX A

**MAJOR FEDERAL ENVIRONMENTAL STATUTES
APPLICABLE TO VESSEL POLLUTION**

KEY PROVISIONS

I. *Clean Water Act, 33 U.S.C. §§ 1251 et seq.*

Pollutants in general. Prohibits discharges of pollutants into the waters of the United States unless a permit is obtained. 33 U.S.C. § 1311. United States EPA regulation excludes from permitting requirement the discharges incident to the normal operation of vessels. 40 C.F.R. § 122.3.

Sewage from vessels. Mandates EPA and Coast Guard establishment of national standards for vessel sewage discharges and sewage processing devices. 33 U.S.C. § 1322(b). Directs the Secretary of Defense to promulgate for DOD vessels regulations to achieve the national standards. 33 U.S.C. § 1322(d). Public vessels are not subject to boarding or inspection regarding sewage from vessels. 33 U.S.C. § 1322(l).

Oil and hazardous substances. Prohibits discharge of oil or hazardous substances in harmful quantity to the waters of the United States. 33 U.S.C. § 1321(b). Requires spiller to report oil and hazardous substance spills to National Response Center. 33 U.S.C. § 1321(b). Establishes a comprehensive program for preparation and Coast Guard approval of "vessel" oil spill contingency plans. Public vessels, such as Navy ships, are not "vessels" to which spill planning requirements apply. 33 U.S.C. §§ 1321(a)(3) and (4). Public vessels are not subject to boarding or inspection regarding oil and hazardous substance spill prevention and control. 33 U.S.C. § 1321(m).

Geographic scope. Clean Water Act geographic coverage for discharges from vessels extends to three miles from shore. 33 U.S.C. §§ 1362(7), (8) and (12).

II. *Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901 et seq.*

International basis. Implements for the United States the International Convention on the Prevention of Pollution from Ships (MARPOL).

Solid Waste Disposal. Establishes deadlines for Navy full compliance with Annex V pertaining to vessel garbage disposal at sea. 33 U.S.C. § 1902(b).

Consolidated Environmental Law Deskbook

Other vessel discharges. For other MARPOL Annexes in force (Annex I on oil, Annex II on carriage of hazardous substances in bulk, Annex III on carriage of hazardous substances in packaged form) requires the heads of Federal agencies to establish regulations for vessels under their control, bringing such vessels into compliance to the extent reasonable and practicable without impairing the operations or operational capabilities of such ships. 33 U.S.C. § 1902(g).

Bounties. Authorizes payment of bounties to persons whose information results in assessment of a civil penalty. 33 U.S.C. § 1908(b).

Geographic scope. Geographic coverage for U.S. vessels extends worldwide. 33 U.S.C. § 1902(a)(1).

III. *Ocean Dumping Act, 33 U.S.C. §§ 1401 et seq.*

International basis. Implements for the United States the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the "London Dumping Convention").

Dumping prohibition. Prohibits transportation of material from the United States or from any other place for the purpose of dumping it into ocean waters, unless a permit is obtained from EPA. 33 U.S.C. § 1411.

Geographic scope. Geographic coverage for U.S. vessels extends worldwide. 33 U.S.C. §§ 1402(b), 1411.

IV. *U.S. Public Vessel Medical Waste Anti-Dumping Act, 33 U.S.C. §§ 2501 et seq.*

Dumping prohibition. Prohibits public vessel disposal of medical waste into ocean waters, except in emergency circumstances. 33 U.S.C. § 2503.

Geographic scope. Geographic scope of "ocean waters" is undefined in the Act, but probably includes the high seas beyond the territorial jurisdiction of any state.

V. ***Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq.***

Oil spill liability. Establishes elements of liability for oil spill damages. 33 U.S.C. § 2702. Establishes a central fund for oil spill cleanup and payment of assessed damages. 33 U.S.C. §§ 2712, 2713. Provides that claims for damages may first be presented to the central fund where the source of the spill is a public vessel. 33 U.S.C. §§ 2713(b)(1)(A), 2714(c)(2).

VI. ***Resource Conservation and Recovery Act, 42 U.S.C. § 6939d***

Public vessel hazardous waste. Provides that hazardous waste generated on board public vessels shall not be subject to storage, manifest, inspection or record keeping requirements until transferred ashore, except where vessel is taken out of service, or where waste is transferred to and stored aboard another public vessel for more than 90 days. 33 U.S.C. § 6939d.

VII. ***Repair or Maintenance of Naval Vessels, 10 U.S.C. § 7311***

Hazardous waste generated in private shipyards. Requires that contracts for work on naval vessels in private shipyards include provisions, inter alia:

- Identifying the types and amounts of hazardous waste to be generated;
- Specifying the respective responsibilities of the Navy and the contractor regarding hazardous waste management;
- Providing that a Navy generator number shall appear on waste solely generated by the Navy; a contractor generator number on waste solely generated by the contractor; and both Navy and contractor generator numbers on waste generated by both.

VIII. ***Defense Environmental Restoration Program (DERP), 10 U.S.C. §§ 2701 et seq.***

Cleanup requirement. Requires SECDEF to carry out response actions where hazardous substances are released from vessels owned or operated by the Department of Defense. 10 U.S.C. § 2701(c)(1)(C).

CHAPTER XXIII

OCEAN DUMPING ACT (ODA)

2301 REFERENCES

- A. Ocean Dumping Act (ODA) (also known as the Marine Protection, Research, and Sanctuaries Act of 1992 (MPRSA)), 33 U.S.C. §§ 1401 *et seq.*
- B. EPA Ocean Dumping Regulations, 40 C.F.R. Parts 220-223
- C. Corps of Engineers Ocean Dumping Regulations, 33 C.F.R. Part 324
- D. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 18
- E. NAVMEDCOMINST 5360.1, Subj: Decedent Affairs Manual, Ch. 8

2302 **OVERVIEW.** The Ocean Dumping Act (ODA) (also known as the Marine Protection, Research, and Sanctuaries Act of 1992 (MPRSA))(33 U.S.C. §§ 1401 *et seq.*) prohibits the transportation of any material from the United States for the purpose of dumping it into ocean waters without a permit issued by the EPA. Also, ODA prohibits dumping material from outside the United States within the territorial sea or contiguous zone.

2303 DEFINITIONS

A. **"Dumping."** Dumping means a "disposition of material." The term dumping does not include a discharge permitted under the CWA. Perhaps more importantly, the term does not include the "routine discharge of effluent incidental to the propulsion or operation of motor driven equipment on vessels," and other authorized shipboard discharges discussed in chapter 22 of this deskbook. 33 U.S.C. § 1402(f). Dumping includes the discharge of any material received from another ship or shore station.

B. **"Ocean waters."** Ocean waters are the waters seaward of the baseline from which the territorial sea is measured. 33 U.S.C. § 1402(b).

C. **"Material."** Material is broadly defined and includes dredged material, solid waste, munitions, chemicals, biological and laboratory waste, medical wastes, and other waste. 33 U.S.C. § 1402(c). The term does not include sewage from vessels. Marine sanitation devices (MSDs) are regulated under other provisions of the CWA. 33 U.S.C. § 1322 and 1402(c).

2304 RESTRICTIONS

A. Ocean dumping will be authorized only on a case-by-case basis by CNO. Except in emergency conditions, requests for authorization shall be accompanied by an environmental assessment (EA) per the National Environmental Policy Act (see chapter 26 of this deskbook). Following CNO approval, full compliance with EPA permitting procedures is required.

B. Under 33 U.S.C. § 1412(a), dumping cannot "unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." Prior to issuing ocean dumping permits for Naval activities (such as ship sinking exercises (SINKEXs)) EPA will thoroughly assess potential impacts in each of these areas. No permits will be issued for radiological, chemical, and biological warfare agents, high-level radioactive waste, and medical waste. Under 33 U.S.C. § 1413(a), the Secretary of the Army may issue permits for the transportation of dredged material for the purpose of dumping it into ocean waters. The Army Corps of Engineers (COE) administers the permit system for dredged materials, using the same standard and dump sites designated by EPA "to the extent feasible."

C. Enforcement measures involve both civil and criminal penalties. Civil enforcement includes administrative compliance / enforcement orders, penalties of \$50,000.00 per violation (\$125,000.00 for violations involving medical waste) and judicial injunctive action. Criminal penalties include five (5) years' imprisonment and / or a \$25,000.00 fine. The ODA also makes provisions for the filing of Citizen Civil suits. 33 U.S.C. § 1415.

2305 BURIAL AT SEA. EPA has granted the Navy a general permit to transport and bury human remains at sea. 40 C.F.R. § 229.1. All burials conducted under the general permit shall be reported within 30 days to the EPA Regional Administrator of the region from which the vessel carrying the remains departed. Chapter 8 of NAVMEDCOMINST 5360.1, Subj: DECEDENT AFFAIRS MANUAL governs preparation of the human remains for burial. Human remains may be buried beyond 3 nm from U.S. land and 12 nm from foreign land. If the human remains are not cremated, the burial must be conducted in waters at least 100 fathoms deep. 40 C.F.R. 229.1 The burial must be reported to the Fleet CINC, copy to Type

Commander, within 30 days. Regional environmental coordinators (RECs) are required under Chapter 18 of OPNAVINST 5090.1A, to submit a report on previous year burials to the appropriate EPA regional office by 15 January of each year.

CHAPTER XXIV

AFLOAT HAZARDOUS MATERIAL /
HAZARDOUS WASTE (HM / HW) CONTROL

2401 REFERENCES

- A. OPNAVINST 5100.19B, Subj: NAVY OCCUPATIONAL SAFETY AND HEALTH (NAVOSH) PROGRAM MANUAL FOR FORCES AFLOAT (VOLS I, II, & III)
- B. *Navy Ships Technical Manual* (NSTM), Ch. 593
- C. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 17
- D. OPNAVINST 3100.6F, Subj: SPECIAL INCIDENT REPORTING (OPREP-3, NAVY BLUE AND UNIT SITREP) PROCEDURES
- E. OPNAVINST 5100.21A, Subj: AFLOAT SAFETY PROGRAM

APPENDIX

- (A) Hazardous Substance Release Report (Reprinted from OPNAVINST 5090.1A, App. H)

2402 HAZARDOUS MATERIALS / HAZARDOUS WASTE

A. **Hazardous material.** Hazardous material (HM) is any material that may pose a substantial hazard to human health or the environment. This hazard may be due to the material's quantity, concentration, or physical, chemical, or infectious characteristics. The term "material," as compared with "waste," signifies that the substance has a useful purpose in its present form.

B. **Hazardous waste.** Hazardous waste (HW) is any hazardous material that has been discarded. Several environmental statutes build the list of HM / HW. The Clean Water Act (CWA), for example, prohibits the discharge of harmful quantities of hazardous substances into U.S. waters within 12 nautical miles (nm) of

land. The Resource Conservation and Recovery Act (RCRA) created a comprehensive regulatory program for hazardous substances. Similarly, the Toxic Substance Control Act (TSCA) regulates certain harmful substances used in the Navy, notably asbestos and polychlorinated biphenyls (PCBs). Consult chapters 12, 15, and 19 of this deskbook for detailed information on particular hazardous materials under those statutes.

C. **Hazardous substances.** OPNAVINST 5090.1A and other directives use the term "hazardous substances" (HS) as a collective term for HM and HW.

2403 SHIPBOARD PROCEDURES. The following procedures shall be followed by ships in their disposal of HM / HW.

A. **U.S. waters.** Navy vessels shall not discharge untreated HM / HW into or upon navigable waters of the United States, adjoining shorelines, or into or upon waters of the contiguous zone (12 nm from shore). Detailed guidance for HM / HW discharges is provided in OPNAVINST 5100.19B and the *Navy Ships Technical Manual* (NSTM) chapter 593. Unless specifically authorized by CNO, HS collected ashore or collected from ships in port may not be discharged overboard.

B. **Foreign territorial seas.** Navy vessels operating in the territorial seas (up to 12 nm) of foreign countries shall abide by discharge regulations specified in the applicable Status of Forces Agreement (SOFA) or international agreement (e.g., stationing or base rights agreements). If the SOFA or other international agreement is silent on the subject of HM / HW discharges, Navy ships shall abide by the substantive discharge standards observed by the host country's military forces until a satisfactory agreement can be reached. Unless otherwise provided in a SOFA or international agreement, Navy vessels operating temporarily within a foreign jurisdiction are subject to that country's standards to the extent specified by the visit clearance. Where the discharge standards for a foreign country are undefined, no HM / HW shall be discharged within 12 nm of land.

C. **Emergency discharge.** Despite the restrictions in paragraphs A and B above, ship commanders *may* discharge HM / HW in two narrowly defined circumstances:

1. When an emergency situation exists; or
2. where failure to discharge the HM / HW would clearly endanger the health or safety of shipboard personnel.

2404 SHIP-TO-SHORE TRANSFER. When transferring HS ashore, ships shall follow the below procedures:

A. **Handling.** Before the HM / HW is transferred ashore, it must be properly segregated, containerized, and labeled per NSTM chapter 593 and OPNAVINST 5100.19B, chapters B3, C23 (surface ships), and D16 (submarines). Failure to do so may result in a charge to the fleet for laboratory analyses to identify the HW. This can cost several thousand dollars per barrel.

B. **Navy ports.** When visiting Navy ports, Navy vessels shall request HW pickup by the cognizant shore activity representative, usually the Public Works Center (PWC). Person-to-person contact is required during the actual transfer of the HW to the shore activity. Ship's force shall complete DOD Form 1348-1 at the time of HW transfer.

C. **Non-Navy ports.** When visiting non-Navy ports and foreign ports, Navy vessels shall off-load HW only when necessary and feasible. The ship shall identify the HW to be off-loaded in the Logistics Requirements (LOGREQ). If unable to find adequate facilities at non-Navy ports, the ship shall hold the HW for off-loading at a Navy port. All HW shall be properly labeled and containerized.

2405 ENTERING PRIVATE SHIPYARDS. Paragraph 17-5.6.2.d. of OPNAVINST 5090.1A lists ship responsibilities before entering a private shipyard for an availability.

A. **Off-loading.** To the maximum extent feasible, the ship should ensure that HW is off-loaded at a Navy or other public facility before entering a private shipyard. HM that will not be used by ship's force during the availability shall also be off-loaded.

B. **Planning and coordination.** The ship must provide a point of contact (POC) to the Supervisor of Shipbuilding (SUPSHIP) responsible for the private shipyard. The POC will be the ship HW coordinator for the availability. The POC shall be given the authority and resources to ensure shipboard compliance with HW management procedures and site-specific management practices established by the SUPSHIP. During preavailability planning conferences, the POC will advise the SUPSHIP of the types and amounts of HW expected to be generated by ship's force during the availability. The POC will identify, and the ship will comply with, all established HW management practices and those site-specific procedures delineated by the SUPSHIP.

2406 HM / HW SPILLS

A. **Spill contingency plan.** Ships are required to develop an HM / HW spill contingency plan (SCP) consistent with the pertinent fleet SCP and per guidelines to be established by COMNAVSEASYSCOM. The ship's HM / HW SCP may be promulgated in conjunction with the ship's oil SCP. The SCP will contain procedures regarding reporting, control, containment, control, recovery, and disposal.

B. **Spill response.** Shipboard personnel must be trained and prepared to take immediate action to mitigate the effects of a spill. To that end, COMNAVSEASYSCOM has developed a spill containment and clean-up kit for quick response first aid capability, akin to their kit for oil spills. When the spill exceeds the ship's response capability, the commanding officer (CO) will notify the Navy On-Scene Commander (NOSCDR) who will mobilize assets and direct response actions.

1. **Shore-based on-scene operations teams (OSOTs).** OSOTs are trained personnel with specialized equipment to contain Oil or Hazardous Substance (OHS) spills. Their primary function is to respond to port spills.

2. **Supervisor of salvage (SUPSALV).** SUPSALV maintains spill response assets to support NOSCs in offshore spill operations. These assets are positioned throughout the United States and overseas to provide fast response and technical support.

2407 SPILL REPORTING. In addition to taking appropriate actions to mitigate the effects of the spill, commanders must notify certain activities if the spill exceeds the reportable quantity, typically one pound, for that particular substance.

A. **All spills.** The commander must notify the cognizant Navy On-Scene Coordinator (NOSC). The numbered fleet commanders are predesignated as fleet NOSC's and will be notified by message. Shoreside NOSC's will be notified by the most expeditious means, followed up by message. The message format is specified in Appendix H of OPNAVINST 5090.1A and is reproduced in Appendix A to this chapter.

1. **Precedence.** HM / HW release messages will normally be by routine precedence provided prior telephone report has been made. If a telephone report has not been made, use priority precedence.

2. **Classification or special handling marking.** Typically, spill reports are unclassified and do not warrant special handling markings. Avoid including classified or sensitive unclassified information to the maximum extent

possible unless this information is necessary to understand and respond to the situation.

B. ***Contiguous zone spills.*** If the spill occurs within the 12 nm contiguous zone of the U.S. coastline, the CO will also notify the National Response Center (NRC) at (800) 424-8802. Many states have notification requirements as well.

C. ***Spills in foreign waters.*** Consult local regulations, SOFA, etc., regarding the possible requirement to notify any country that has potential to be affected by an HM / HW spill in foreign or international waters.

D. ***Environmentally significant spills.*** If the spill is "environmentally significant," the initial reporting shall be made using the OPREP-3 system under OPNAVINST 3100.6F. An environmentally significant spill is one which: results from catastrophic events; could cause significant adverse public reaction; could have geopolitical implications; or otherwise warrants OPREP-3 special incident reporting. The OPREP-3 report will be followed up by the amplifying message report discussed above.

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APPENDIX A

**HAZARDOUS SUBSTANCE RELEASE REPORT
(MESSAGE / NAVGRAM FORMAT)**

FM: NAVY ACTIVITY/SHIP (spiller)
TO: NOSC/NOSCDR (see Chapter 11 or 17 of OPNAVINST 5090.1A)
OPERATIONAL COMMANDER

INFO: CNO WASHINGTON DC//45//
NEESA PORT HUENEME CA//112//
COMNAVSEASYS COM WASHINGTON DC//OOC//

If the HM / HW release occurs in the United States and its
12 nm contiguous zone, add the following info addressee:

COGARD NATIONAL RESPONSE CENTER WASHINGTON DC//JJJ//

UNCLAS//NO5090//

SUBJ: HS RELEASE REPORT (REPORT SYMBOL OPNAV 5090-3)
(MIN: CONSIDERED)

MSGID/GENADMIN/ORIGINATOR//

RMKS/

1. GMT DTG RELEASE OCCURRED/DISCOVERED.
2. ACTIVITY/SHIP ORIGINATING RELEASE:

For ships, list: name, hull number, and UIC. For shore activities, list: name, UIC. For Navy releases that occurred during transportation, list: name of activity responsible for shipment. For non-Navy releases, list the name of responsible party. If from commercial firm under contract to Navy, list the names of the firm and the contracting activity. If the source of the release is unknown, indicate whether the release is thought to have originated from Navy operations.

3. RELEASE LOCATION:

For releases at sea, list: latitude, longitude, and distance to nearest land. For releases in port, list port name and specific location (e.g., pier, warehouse, etc.). For releases ashore within the activity, specify the exact location (e.g., building number, area designation, etc.). For releases during transportation, give exact location (e.g., highway and miles from nearest city or street name, number, and city).

4. TYPE OF OPERATION AT SOURCE:

Be specific (e.g., plating shop, painting shop, HW facility, truck, ship, pipeline, ship building, entomology shop, etc.).

5. TYPE OF CONTAINER FROM WHICH SUBSTANCE(S) ESCAPED:

E.g., 55-gal drums, 5-lb bags, tank truck, storage tank, can, etc. Estimate number of containers damaged or dangerously exposed.

6. DESCRIPTION OF HS RELEASED:

Be concise but complete. Consider container labels and use directions, HM reference books, personal knowledge, expert's advice, etc.

If substance(s) known: give chemical and / or product names, formula, synonym(s) (if known), physical and chemical characteristics, and inherent hazards. **EXAMPLE:** Label on container identifies substance released as acrylonitrile. Synonyms: cyansethylene, vintleyanide. Characteristics and hazards: poisonous liquid and vapor, skin irritant, highly reactive and flammable.

If substance(s) unknown: describe appearance, physical and chemical characteristics, and the actual and potential hazards observed. **EXAMPLE:** Substance released is a colorless to light yellow unidentified liquid; highly irritating to eyes and nose; smells like kernels of peach pits. Is vaporizing quickly, posing ignition problem.

7. FIELD TESTINGS:

Indicate findings and conclusions (e.g., concentrations of substance(s) present, Ph, etc.) of any analyses; if none, so state.

8. ESTIMATED AMOUNT RELEASED:

Use convenient units of weight or volume (kg, lb, gallons, liters, etc.). For continuous releases, estimate rate of release and amount left in container.

9. CAUSE OF RELEASE:

Describe the specific cause of release. Account for any personnel error, equipment failure, accident, or act of God directly contributing to the release. **EXAMPLE:** Railing supporting 55 gal drums on a flatbed truck gave way because it was not securely fastened, causing several drums to fall and fracture.

10. RELEASE SCENE DESCRIPTION:

Describe the scene of release. Include information about: the physical characteristics; size and complexity of release; and the actual and potential danger or damage to the immediate area and the surrounding environment, including weather conditions if relevant. **EXAMPLE:** Solvent released formed shallow pond covering area about 30 ft by 45 ft of bare soil. Solvent is slowly running off into floor drain leading to storm drain and is also infiltrating soil. Pond is emitting highly toxic and flammable vapors. Dark clouds threatening to rain. Wind speed about 10 miles / hour, drifting vapors northbound to residential area. Vapors form layer about 30 ft above ground.

11. NOTIFICATIONS MADE AND ASSISTANCE REQUESTED:

List all organizations informed of the release in and out of Navy jurisdiction. Include Navy, Federal, state, and local authorities, NRC response teams, fire departments, hospitals, etc. Specify the kind of assistance required from these organizations.

12. DESCRIBE CONTROL AND CONTAINMENT ACTIONS TAKEN / PLANNED:

Specify the method used to control and contain release. Identify the parties carrying out response. If none, state why. **EXAMPLE:** Gas barriers used to control and contain vapor emissions. Runoff contained by excavating ditch circumscribing affected area. In-house personnel and members of city of Portstown fire department carried out containment actions.

13. DESCRIBE CLEAN-UP ACTIONS TAKEN / PLANNED:

Indicate whether cleanup is made by on-site or off-site treatment, the method used, the parties involved in cleanup / removal, and the eventual disposal area. If none, state why. **EXAMPLE:** No clean-up action taken. Toxic vapors present, potential danger to clean-up crew. Contaminated soil will be excavated and shipped by on-base personnel to Class I HW disposal site in Portstown, CA, when conditions allow.

14. CONTACT FOR ADDITIONAL INFORMATION:

Identify the name, code, and DSN, and / or commercial number for the point of contact.

15. ADDITIONAL COMMENTS.//

CHAPTER XXV

MEDICAL WASTE AFLOAT

2501 REFERENCES

- A. United States Public Vessel Medical Waste Anti-Dumping Act of 1988, 33 U.S.C. §§ 2501 *et seq.*; implemented by CNO MSG 311935Z OCT 88
- B. Ocean Dumping Act (ODA) (also known as the Marine Protection, Research, and Sanctuaries Act of 1992 (MPRSA)), 33 U.S.C. §§ 1401 *et seq.*
- C. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 17

APPENDIX

- (A) Medical Waste Summary Chart

2502 BACKGROUND. When it comes to conjuring up distasteful images and creating adverse public sentiment, few environmental debacles can compete with the wrongful dumping of medical waste. Regrettably, the Navy has discovered this firsthand. Three statutes are the primary regulators of this narrow field. The United States Public Vessel Medical Waste Anti-Dumping Act of 1988 (hereinafter referred to as Medical Waste Anti-Dumping Act) and the Ocean Dumping Act, discussed in paragraphs 2503-2504 below, apply to ocean discharges.

2503 DEFINITIONS. Essentially, two types of medical wastes are regulated: "potentially infectious medical waste" and "other medical waste."

A. **Potentially infectious medical waste.** Under section 2502 of the Medical Waste Anti-Dumping Act, "potentially infectious medical waste" includes "isolation wastes, infectious agents, human blood and blood products, pathological wastes, sharps, body parts, contaminated bedding, surgical wastes and other disposal medical equipment and material that may pose a risk to the public health, welfare

or the marine environment." The Ocean Dumping Act (ODA) defines the term "medical waste" in a similar manner at 33 U.S.C. § 1402(k). A more detailed list is provided in paragraph 17-3.7.3 of OPNAVINST 5090.1A.

B. **Other medical waste.** "Other medical waste" is best defined as disposable medical equipment and material that does not meet the definition of "potentially infectious medical waste."

2504 DUMPING RESTRICTIONS

A. **General prohibition.** Except in extremely narrow circumstances, the dumping of "potentially infectious medical waste" into ocean waters is prohibited. Under ODA section 1412(a), permits cannot be issued to discharge medical waste and, under Medical Waste Anti-Dumping Act section 2503, no public vessel shall dispose of potentially infectious medical waste.

B. **Narrow exception.** The sole exception to the general prohibition is found in the Medical Waste Anti-Dumping Act at section 2503(1)(A) and (B) and authorizes discharge:

1. When the health or safety of individuals on board the vessel is threatened; or
2. during time of war or declared national emergency.

C. **Dumping procedures.** If the exception applies, the waste is sterilized, properly packaged, and sufficiently weighted to prevent it from coming ashore after disposal. Submarines do not have to sterilize their medical waste. The waste must be dumped more than 50 nautical miles (nm) from land. The 50 nm limit is **not** a third exception; rather, it is an additional restriction which is effective when one of the two narrow exceptions applies. The command must keep administrative records of all overboard discharge of potentially infectious medical waste. 33 U.S.C. § 2503(2), (3)(A) and (B).

D. **Sharps.** "Sharps" include sharp things such as hypodermic needles, syringes, scalpel blades, Pasteur pipettes, specimen slides, cover slips, glass petri plates, and broken glass potentially contaminated with infectious material. Even if an exception applies, sharps can never be dumped. All sharps, used or unused, shall be collected in plastic autoclavable containers and disposed of ashore.

E. **Discharge of "other medical waste."** Medical waste which is not potentially infectious can be disposed of as trash. This discharge is subject to the discharge restrictions for trash, but neither steam sterilizing nor special handling is required.

F. ***Enforcement.*** While the Medical Waste Anti-Dumping Act lacks statutory enforcement teeth, section 1415 of the ODA imposes stiff penalties for unlawful discharging of medical waste. Violations are punishable by civil penalties of \$125,000.00 per incident. Criminal violations carry a maximum penalty of five (5) years' imprisonment and a \$250,000.00 fine.

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APPENDIX A

MEDICAL WASTE SUMMARY CHART

AREA	POTENTIALLY INFECTIOUS MEDICAL WASTE
U.S. Internal Waters & Territorial Seas (0-50 nm)	Autoclave, store, and transfer ashore. No discharge.
> 50 nm & high seas	If waste presents health hazard or during times of war, autoclave, package, weight to sink, and discharge. No discharge of sharps.
Other Areas	See 33 U.S.C. § 1416(d).
Foreign Countries	Consult SOFA or other international agreements.
<p>Remarks: All sharps to be disposed of ashore. Plastic and wet materials shall not be incinerated. Other medical waste may be disposed of as trash and does not require autoclaving or special handling. The autoclave requirement does not apply to submarines.</p>	

CHAPTER XXVI

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

2601 REFERENCES

- A. National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4321 *et seq.*
- B. Clean Air Act § 309, 42 U.S.C. § 7609, Environmental Protection Agency (EPA) review of Environmental Impact Statements (EISs)
- C. Council on Environmental Quality Regulations (CEQ), 40 C.F.R. Parts 1500-1508
- D. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, *reprinted at* 42 U.S.C. 4321 note, 44 Fed. Reg. 1957 (Jan. 4, 1979)
- E. DOD Directive 6050.1, Subj: ENVIRONMENTAL EFFECTS IN THE UNITED STATES OF DOD ACTIONS, *reprinted at* 32 C.F.R. Part 214.
- F. DOD Directive 6050.7, Subj: ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS, *reprinted at* 32 C.F.R. Part 197.
- G. Council on Environmental Quality (CEQ) Guidance: The 40 Questions, 46 Fed.Reg. 18,026 (March 23, 1981)
- H. SECNAVINST 5090.6, Subj: EVALUATION OF ENVIRONMENTAL EFFECTS FROM DEPARTMENT OF THE NAVY ACTIONS
- I. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 5
- J. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 5

APPENDIX

(A) NEPA Case Law

2602 STATUTORY PURPOSE. The National Environmental Policy Act (NEPA)(42 U.S.C. §§ 4321 *et seq.*) was enacted to serve as a basic national charter for protection of the environment. It expressly declares its purpose is to promote efforts "which will prevent or minimize damage to the environment" and it tasks Federal agencies with using all practicable means to fulfill their responsibilities as "trustees of the environment." In effect, NEPA makes environmental protection the mandate of every Federal agency. To achieve the purpose of NEPA, the legislation contains "action-forcing" mechanisms to ensure that environmental factors are given due consideration whenever federal actions could affect the human environment. Major federal actions must be necessary, as opposed to merely expedient, and must be undertaken in a manner designed to minimize adverse environmental impacts.

A. NEPA created The Council on Environmental Quality (CEQ) to oversee its implementation and to serve generally as the President's advisor on environmental issues. CEQ regulations were designed to ensure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the Federal Government. See 40 C.F.R. § 1500.2. CEQ regulations require public officials to have an understanding of the environmental consequences of a given action *prior to* making a decision to commit to that action. In other words, the central issue under NEPA is whether or not a contemplated federal action is deemed necessary by the decisionmaker after a good faith consideration of its environmental impacts.

B. NEPA is procedural, rather than substantive, in nature. Accordingly, NEPA does not mandate the most environmentally favorable result. Rather, it requires agency decisionmakers to: fully disclose and consider environmental information when making decisions; inform the public of potential impacts and alternatives; and involve the public in NEPA decisionmaking. Briefly stated, NEPA opens federal decisionmaking to public scrutiny and involvement, but does not dictate selection of particular courses of action. Thus, an agency's compliance with NEPA is not evaluated upon the "wisdom" of the decisionmaker's choice of action, but upon the extent of procedural compliance (i.e., were environmental issues identified, analyzed, and considered?). If they were, NEPA requirements are satisfied, even if the resulting decision negatively impacts the environment. However, if the methods, scopes, or conclusions underlying a decision are so factually inadequate or erroneous that acting upon them would be considered arbitrary and capricious, the Federal agency's actions are subject to collateral attack under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1978).

WHEN DOES NEPA APPLY?

A. **Defining key terms.** NEPA applies to "planning and decisionmaking" by Federal agencies which "may have an impact on man's environment." 42 U.S.C. § 4332(2)(A). When a Federal agency has a goal, and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, the NEPA process must be used to determine the impact of recommended options, among other reasonable alternatives, as soon as effects can be meaningfully evaluated. 40 C.F.R. § 1508.23.

1. **Federal action.** A federal action is one which is partly, or entirely, financed, assisted, conducted, regulated, or approved by Federal agencies, and includes new or revised agency rules, regulations, plans, policies, or procedures, as well as legislative proposals. Federal actions do *not* include funding assistance solely from general revenue sharing where there is no Federal agency control over the use of the funds. However, the expenditure of money and issuance of a permit are usually enough of a federal action to trigger NEPA. As a practical matter, if a federal action is being considered, NEPA applies (unless an exception exists). 40 C.F.R. § 1508.18

2. **Impact.** Impacts are synonymous with "effects" and include both direct and indirect effects. Direct effects may be caused by a proposed action and occur at the same time and place. Indirect effects may occur later in time, or farther away, but are still reasonably foreseeable at the time of the federal action. Impacts may include ecological, aesthetic, historic, cultural, economic, social, and health effects, both detrimental and beneficial, though socio-economic effects may only be considered if they accompany physical effects. 40 C.F.R. § 1508.8. Since the NEPA process seeks to determine the degree of impact a federal action might have, defining "impacts" serves primarily to set out the parameters of a NEPA analysis, but does not precisely determine when to apply the NEPA process. Potential effects do, however, dictate the level of documentation required to satisfy NEPA requirements: a concise Environmental Assessment (EA) is sufficient when no significant impacts will result from anticipated federal action, while the more detailed Environmental Impact Statement (EIS) is required for federal actions with major environmental impacts.

3. **Major federal actions.** "Major federal actions significantly affecting the quality of the human environment" include new and continuing activities, as well as any failure to act, which could have a major impact on the environment. 40 C.F.R. § 1508.18(a). "Major" reinforces but does not have a meaning independent of "significantly." See also 40 C.F.R. § 1508.27.

a. To determine whether an action is "major," consider:

Consolidated Environmental Law Deskbook

(1) Actions of large and considerable importance, involving substantial expenditures of money, time, and resources;

(2) amount of federal funds expended, number of people affected, length of time consumed, and extent of government planning involved;

(3) whether it includes actions with "effects that may be major;" or

(4) whether the action poses a threat of substantial environmental harm or is environmentally controversial.

b. The determination of "major federal action" is key to selecting the appropriate level of decisionmaking documentation (e.g., an EIS should accompany any recommendation for a major federal action).

c. An agency may not circumvent NEPA documentation requirements by dividing a project into parts, no one of which would have a major impact alone, but, when considered together, would have a significant *cumulative impact*.

4. **Human environment.** This term is interpreted comprehensively to include the natural and physical environment and the relationship of people within that environment. 40 C.F.R. § 1508.14. *See also* 40 C.F.R. § 1508.8, "effects."

B. Types of actions

1. **General guidance.** Federal actions subject to NEPA requirements tend to fall within one of the following categories: adoption of official policies and formal plans; new management and operational concepts and programs (e.g., research and development); specific projects (e.g., facilities construction); activities (e.g., unit training and flight operations); activities involving radioactive materials; leases, easements, permits, and other forms of permission to use federal land; hazardous materials clean-up; and federal contracts, grants, subsidies, and loans. 40 C.F.R. § 1508.18(b).

2. **Emergency actions.** Actions taken as needed to control the immediate impacts of an emergency need not be preceded by the NEPA process. 40 C.F.R. § 1506.11. For example, emergency actions not requiring NEPA documentation might include search and rescue operations, but not riot follow-on activities like clean-up operations.

3. **Statutory exemptions.** Some narrow exemptions exist, such as the Base Realignment and Closure (BRAC) selection process, but there is no "military necessity" exemption.

4. **Statutory conflicts.** NEPA compliance is excused, if the requirements of another federal statute make it impossible.

2604 THE DOCUMENTATION REQUIREMENT

A. **General planning considerations.** 42 U.S.C. § 4332(2) and 40 C.F.R. § 1501.

1. Use "a systematic, interdisciplinary approach to ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."

2. "[I]dentify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."

B. **Three levels of analysis and documentation.**

1. Categorical exclusions (CATEXs);
2. Environmental Assessment (EA); or
3. Environmental Impact Statement (EIS).

C. **Categorical exclusions (CATEXs)**

1. The Department of the Navy (DON) has already determined certain actions have no significant impact on the environment. There are 33 such categorical exclusions for DON listed in Paragraph 5-4.2 of OPNAVINST 5090.1A, 32 C.F.R. § 775.6. Navy CATEXs include reductions in force, routine movement of ships, etc.

2. Additional CATEXs may be established by the Navy through publication in the Federal Register, using the following criteria:

a. Minimal or no individual or cumulative effect on the quality of the environment;

b. no environmentally controversial change to existing conditions and

c. The effect is primarily economic or social.

3. **Action.** Activities which have been categorically excluded require neither an EA nor an EIS. However, the decision to rely upon a CATEX, and forego preparing an EA or an EIS, **must be documented** per OPNAVINST 5090.1A. Environmental planners are often tempted to look at a given proposal that, in their eyes, obviously will have no significant impact on the environment and CATEX it. CATEXs are not a substitute for proper environmental documentation and analysis. They should be strictly construed and only used where the proposed action fits within the exclusion. Furthermore, a CATEX should not be used under some circumstances, even if available, such as when: a proposed action would be greater in scope or size than those normally encompassed by the category; the action would threaten to violate federal, state, or local requirements; it would affect an endangered species, the public health, or safety; or is scientifically controversial. See Paragraph 5-4.1 of OPNAVINST 5090.1A. (32 C.F.R. § 775.6(e)).

D. Environmental Assessments (EAs). 40 C.F.R. §§ 1501 *et. seq.* The EA is a **concise** public document, providing facts and analysis **in plain language** for determining the environmental significance of the proposed action.

1. **When required.** The EA is prepared when:

a. the proposed action is **not** within a CATEX; and

b. the proposed action is **not** a "major federal action significantly affecting the quality of the human environment" (MFASAQHE); or

c. it is unclear whether or not the proposed action is a MFASAQHE.

In other words, every non-CATEX federal action will result in either an EA or an EIS. If you **know** that the proposal **is** a MFASAQHE, an EIS is required and there is no need to prepare an EA as an interim step, unless it will help in preparing the EIS. If you are not certain the proposed action is a MFASAQHE, doing an EA will determine that the proposed action is a MFASAQHE, or it will result in a finding of no significant impact (FONSI) to the environment.

2. **Contents.** The EA may be viewed as a "mini" EIS; it considers the same basic issues, but in a less comprehensive document than an EIS. It is intended to briefly provide sufficient evidence and analysis to determine whether to prepare an EIS or a FONSI. No particular format is specified, but EAs typically

follow the general format of an EIS. If a proposed action is amended, the EA must be reevaluated to ensure it covers the pertinent aspects of the amended project. Generally, the EA will:

- a. Describe the proposed action and discuss its purpose and the need it satisfies;
- b. identify the appropriate and reasonable alternative actions that have been considered;
- c. describe the affected environment and the impact of the proposal and the alternatives on the environment;
- d. list the agencies and people consulted in preparing the EA;
- e. show that the decisionmaker has reviewed the EA along with other appropriate planning documents; and
- f. conclude with either an explicit FONSI or a conclusion that an EIS is necessary.

3. **Public involvement.** The EA is a public document, but there is no specific requirement for public hearings, scoping, public notice, publication of a draft, response to comments, etc. during the preparation of the EA. By regulation, the agency "shall involve environmental agencies, applicants, and the public, to the extent practicable" 40 C.F.R. § 1501.4(b). If a proposed action is controversial, the EA will enjoy more weight on judicial review if the public was significantly involved in the process of its development.

4. **FONSI.** Every EA will result in either a FONSI or the conclusion that an EIS is required. A FONSI is a document which briefly presents the reasons why a proposed action will not have a significant impact on the human environment. It creates an administrative record for review (i.e., it documents why an EIS is unnecessary). A FONSI will include the EA or summarize it. A FONSI must be:

- a. Issued before action can proceed;
- b. published in the affected geographic area in a manner to reach interested parties effectively;
- c. published in the Federal Register, if the action is a matter of national concern; and

d. open to the public at hearings during the 30-day review period required when the proposed action is similar to one normally requiring preparation of an EIS or the action is a case of first impression.

E. **EISs.** When an action does not fit within a CATEX and an EA would be inadequate, the more comprehensive EIS must be prepared. 40 C.F.R. §§ 1501.4, 1502.1-1502.25, 1508.11.

1. **When required.** An EIS may be required because the proposal:

a. Is a MFASAQHE. "Major" just reinforces "significantly." "Significantly" requires consideration of both the *context* of the action (i.e. nationwide, regional, local) and the severity of the impact;

b. does not qualify for CATEX treatment and is not an EA candidate;

c. is *environmentally* controversial (i.e., substantial dispute exists over the scope or nature of the environmental impact, *not* general opposition to action); or

d. was determined in an EA to require an EIS.

2. **Examples.** Actions which could be expected to require an EIS include:

a. Significant expansion of a military installation.

b. Significant construction in an environmentally sensitive area (e.g., wetlands).

c. Land acquisition, outleasing, and other actions which may lead to significant change in land use.

d. Closure of a major installation (unless the only impacts are socioeconomic).

e. Training exercises conducted outside the installation when significant environmental damage might occur.

3. **Defining the scope of complex or segmented actions.** Various tests have been developed to determine whether the EIS must go beyond the immediate proposal.

a. Does the proposal involve an "irretrievable commitment" of resources, practically foreclosing alternative options?

b. Would it be "irrational and unwise" to implement the proposal unless further steps were to be pursued later?

c. Does the proposal have "independent utility" apart from possible related future actions?

d. Are the actions "connected," "cumulative," or "similar"?
40 C.F.R. § 1508.25(a).

4. ***The EIS process.***

a. ***Scoping.*** Scoping is used to get interested parties involved and to identify issues that the EIS will need to address. Federal, state, and local agencies; Indian tribes; and "other interested persons" are invited to participate and attend public hearings. 40 C.F.R. § 1501.7.

b. ***Draft EIS (DEIS).*** The DEIS is a public document: not really a "draft," but a term of art.

c. ***Public review.*** The DEIS is distributed for public comment (at least 45 days). More public hearings are held and are transcribed verbatim.

d. ***Final EIS (FEIS).*** The FEIS will summarize the public hearings on the DEIS and respond to all oral and written comments made on the Draft.

e. ***Public review.*** No public comment period after FEIS is published, but no decision can be made on the proposed action until 30 days after the public has been notified the FEIS has been filed with EPA. 40 C.F.R. § 1506.10.

f. ***Record of decision (ROD).*** This is a public summary of the FEIS. The ROD is prepared at the time of decision or when the recommendation goes to Congress. Until the ROD is issued, the agency shall not take any action which will have adverse impact on the environment or limit the choice of reasonable alternatives.

5. ***Contents of the EIS.*** Although the regulations indicate that the EIS is intended to be a concise document, prepared in plain language, normally less than 150 pages, in fact, it can run to thousands of pages and cost as much as \$1.5 million. Per 40 C.F.R. § 1502.10, the recommended format is as follows:

a. **Summary.** Following the cover sheet, the EIS will include a summary which will stress the major conclusions, areas of controversy, and the issues to be resolved, including the choice among the alternatives. The table of contents follows the summary.

b. **Purpose and need for action.** Require your planners to articulate their thought processes on the *need* for the project because the underlying need defines the range of alternatives that must be analyzed in the EIS. Reasonable alternatives are alternative ways to satisfy the underlying need. By stating the need precisely, the EIS can focus on genuine alternatives and obviate debate of others.

c. **Alternatives.** This section identifies, analyzes, and evaluates *reasonable* alternatives to the action. Analysis should be done on a comparative basis to define the issues and provide a clear basis for decisionmaking.

(1) In addition to the alternative of "no action," reasonable alternatives include actions which are: outside agency control or jurisdiction, technologically feasible, or consistent with the purpose of the proposed action.

(2) This section also identifies the preferred agency alternative. It doesn't matter if the preferred alternative is the one selected by the decisionmaker.

(3) This section may also discuss mitigation measures which avoid, lessen, rectify, or compensate for the adverse impact of the proposed action. Once committed to, mitigation measures must be carried out. (Mitigation, in a proposed action in an EA, can in some cases, reduce a "significant impact" to "less than significant," thereby avoiding the requirement to do an EIS.)

d. **Affected environment.** The EIS must succinctly describe the environment and the areas to be affected, yet not be longer than necessary to understand the effect of the alternatives. Consequently, after the analytical portion comparing the alternatives is completed, drafters should return to the descriptive portion and pare it down: anything not necessary to support the analysis of alternatives is surplusage.

e. **Environmental consequences.** This section examines the environmental impact of the proposed action as compared with the impact of the reasonable alternatives. Direct and indirect effects are discussed.

(1) Direct impacts include "connected actions" (i.e., those which: automatically trigger other actions which may require an EIS, cannot or will not proceed unless other action is taken simultaneously; or are interdependent parts

of a larger action and depend on larger action for justification) and "cumulative" or "synergistic" impacts (i.e., the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions regardless of which agency or person undertakes the other action).

(2) Indirect impacts are caused by the action, but are later or further away. They can include the related effects on air and water from economic growth, population growth, or shifts in land use patterns.

(3) This section will also examine: possible conflicts with federal, regional, state, or local land use plans or policies; the impact on energy and other resource requirements; and the impact on the cultural environment.

f. The environmental consequences section is followed by the list of the people who prepared the EIS and the list of agencies, organizations, and persons to receive copies of the statement. This is followed by the index and any appendices.

2605 NEPA LITIGATION. As stated above, NEPA is a procedural, not a substantive statute. NEPA itself does not provide a cause of action. Violators of NEPA are not subject to fines, penalties, or criminal sanctions. Consequently, many erroneously assume that NEPA lacks teeth. In fact, NEPA can be a true show-stopper.

A. *Types of plaintiffs.* Potential NEPA plaintiffs include environmental advocacy groups, politically motivated groups, Not In My Back Yard (NIMBY) groups, and states. To show standing, the plaintiff must be injured in fact and within the zone of interests protected. Typically, standing is not a serious issue because the injury need not be monetary; the injury may be aesthetic, nuisance (e.g., upset traffic patterns), etc.

B. *Judicial review.* The applicable standard of review under the APA may vary with the nature of the plaintiff's attack. Generally, the suits fall into one of two categories.

1. Plaintiff alleges that the agency should have prepared an EA or EIS, but did not.

a. The circuits are split on the applicable standard of review in this case. The 1st, 2d, 4th, and 7th Circuits apply an arbitrary, capricious, or abuse of discretion standard. The 5th, 8th, 9th, and 10th Circuits, and possibly the 3d and 11th Circuits, apply a rule of reasonableness. The D.C. Circuit uses a hybrid. The Supreme Court may have answered the question in *Marsh v. Oregon Natural*

Consolidated Environmental Law Deskbook

Resources Council, 490 U.S. 360 (1989) when it ruled that the arbitrary and capricious standard should be used in reviewing an agency decision not to prepare a **supplemental EIS**.

2. Plaintiff alleges that the agency's EA, FONSI, CATEX, or EIS was inadequate.

a. Reviewing courts look for full and fair compliance with NEPA. Applying a "rule of reason," the court will examine whether the NEPA documentation:

(1) Includes sufficient, but not overwhelming, detail to allow the decisionmaker and the public to understand environmental issues;

(2) explains alternatives sufficiently to allow a reasoned choice; and

(3) demonstrates that the agency has, in good faith, taken a "hard look" at the environmental consequences of a proposed action.

C. **Remedies for violations.** The most common remedy for a violation of NEPA is an injunction. Once a violation has been proven, the plaintiff is arguably entitled *some* remedy. However, precedent suggests that courts still can apply the equitable principles in deciding whether to enjoin the federal action.

2606 MISCELLANEOUS ISSUES

A. **The role of the President's CEQ.** CEQ advises the President on environmental matters and makes an annual report to the nation on the state of the environment. Some of their authority has eroded: their tasking to review EISs is now performed by EPA. Similarly, interagency environmental disputes are now resolved by Office of Management and Budget (OMB). CEQ promulgates NEPA regulations which serve as an informal "restatement" of NEPA case law. 40 C.F.R. § 1500 *et seq.*

B. **Classified information.** 40 C.F.R. § 1507.3(c). Classified information does not relieve the agency of the requirement to assess and document the environmental effects of the proposed action. A full EIS, however, need not be produced.

C. **"Worst case analysis" and insufficient data.** Formerly, agencies were required to consider the "worst case" of environmental effects if there was insufficient information to analyze the impacts. Under the 1985 revision, the agency must inquire whether the incomplete or unavailable information is essential to a

reasoned choice among alternatives? If so, and the information is available at reasonable cost, the agency should obtain the information. If the information is not available within the state of the art, or the costs are exorbitant, weigh the risks against the need to proceed in face of uncertainty. If the agency needs to proceed, make it clear that information is lacking, state the relevance of the missing information, summarize credible existing evidence, and state the agency's evaluation of the impacts based on generally accepted scientific methods.

D. **When it's over.** Satisfying NEPA does not necessarily meet the requirements of other statutes. The EA / EIS may be only one requirement. The agency may still need permits required by other laws. Officials may have to coordinate with the state historic preservation officer (SHPO) as required by the National Historic Preservation Act (NHPA) (16 U.S.C. §§ 470 *et seq.*), fish and wildlife coordination requirements, etc.

E. **NEPA compliance overseas.** As of February 1994, the National Security Council (NSC) was chairing a working group to develop the basic structure of a revised policy regarding compliance with NEPA overseas. A "concept paper" has been drafted that includes an Executive order which would require an increase in the amount of analysis that is done for overseas actions, but which would otherwise hold the line against large scale extensions of NEPA. Several major issues, however, remain unresolved. Pending iteration of national policy, the leading cases include: *EDF v. Nat'l Science Found. ("Massey")*, 986 F.2d 528 (D.C. Cir. 1993) (NEPA applies to major federal actions affecting Antarctica where compliance with the act involves government decisions made within the United States, imposes no substantive requirements governing conduct abroad, and will not lead to clash with laws of other sovereign countries or threaten foreign policy) and *NEPA Coalition of Japan et al v. Aspin*, 837 F. Supp. 466, (D.D.C. 1993) [provides some basis for limiting the holding in *Massey* to areas not under the jurisdiction of a single sovereign (i.e., the global commons)]. See also Executive Order 12,114, Environmental Effects Abroad of Major Federal Actions (January 4, 1979).

F. **NEPA and BRAC.** The legislation establishing the BRAC selection process specifically exempts it from NEPA, since its procedures are essentially equivalent to NEPA. However, the impact of realignment or closure of an individual installation may be subject to NEPA before implementation of a BRAC decision. For example, consideration should be given to closure options, including potential reuse versus disposal. Transfer to other Federal agencies for the same use may qualify under a categorical exclusion, but a new use may need to be evaluated. If an installation—or certain functions—is to be relocated, the receiving installation should conduct a NEPA analysis to assess the impact of the proposed new tenant.

2607 **BOTTOM LINE.** While Federal officials will not go to jail for a NEPA violation, failure to adhere to the statute's procedural requirements can be costly in time and money. Given the reliance on the APA and the Federal Rules of Civil Procedure, NEPA litigants with a prima facie case can seriously bog down, if not stop, a proposed action until a judicially adequate EIS is completed. Hopefully, this will encourage planners to fulfill the NEPA requirements vigorously in good faith. The reward is the ability to proceed on the chosen course even if it is not the best alternative from purely an environmental perspective. In reviewing the administrative record, the court cannot substitute its judgment for the agency's. So long as the chosen course is not arbitrary, capricious, without reasonable basis, otherwise in violation of the law, etc., the action will ultimately go forward. As the Supreme Court has said, NEPA prohibits only uninformed decisions, not unwise ones. In NEPA, the name of the game is doing it right from the beginning.

2608 **ADDITIONAL READING.** For a detailed examination of this subject, see Captain Julie K. Fegley, USAF, *The Nat'l Env'tl. Policy Act: The Underused, Much-Abused, Compliance Tool*, 31 A.F. L. Rev. 153 (1989).

APPENDIX A

NEPA CASE LAW

Am. Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983) (while some courts regard general equity principles as applicable to the granting or injunctive relief, some cases refer to a presumption of irreparable injury if NEPA has been violated).

Amoco Prod. Co. v. Gambell, 480 U.S. 531 (1987) (court overruled the 9th Circuit's opinion that a violation of an environmental statute almost automatically requires an injunctive remedy). *But see Public Serv. Co. of Colorado v. Andrus*, 825 F. Supp 1483 (D. Idaho 1993).

City of Rochester v. United States Postal Serv., 541 F.2d 967, (2d Cir. 1976); *City of West Chicago, Illinois v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983); *Park County Resource Council, Inc. v. U.S. Dept. of Agriculture*, 817 F.2d 609 (10th Cir. 1987); *Save the YAAK Committee v. Block*, 840 F.2d 714 (9th Cir. 1988) (divisibility of a federal action under NEPA).

Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976) (court fashioned a remedy other than an injunction for a violation of NEPA).

Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th C. 1974); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973) (Tests for determining whether an EIS is required; holding called into doubt by *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990) and *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395 (D.D. Cir. 1992).

Hanly v. Kleindienst I, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Hanly v. Kleindienst II*, 484 F.2d 448 (2d. Cir. 1973) *cert. denied*, 416 U.S. 936 (1974) (EA is judicially reviewable; CATEx treatment inappropriate); declined to be followed in *Concerned Residents of Buck Hill Falls v. Grant*, 388 F. Supp. 394 (M.D. Pa. 1975) and *Nat'l Ass'n of Gov't Employees v. Rumsfeld*, 418 F. Supp. 1302 (E.D. Pa. 1976).

Image of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978) (Socioeconomic effects alone will not require the preparation of an EIS, but if interrelated with other factors, they must be discussed).

Julis v. Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972); *NRDC, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972); *Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor*, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*,

446 U.S. 936 (1980); *River Road Alliance, Inc. v. COE of the United States Army*, 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986) (tests for whether a federal action is "major").

Kleppe v. Sierra Club, 427 U.S. 390 (1976) (when an action is "proposed"); called into doubt by *Atchison, Topeka and Santa Fe Ry. Co. v. Callaway*, 459 F. Supp. 188 (D.D.C. 1978).

NRDC, Inc. v. Administrator Energy Research and Dev., 451 F. Supp. 1245 (D.D.C. 1978) (EIS must include an "alternatives" section discussing all reasonable alternatives - chosen and reviewed using a "rule of reason").

Pennsylvania v. Morton, 381 F. Supp. 293 (D.C.D.C. 1974) (Environmental values must be taken into consideration at each discrete stage of decision making process).

Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't. of the Navy, 898 F.2d 1410, (9th Cir. 1990); *City of Alexandria v. Fed. Highway Admin. (FHA)*, 756 F.2d 1014 (4th Cir. 1985) (Agency CATEX action upheld); disagreed with by *Park County Resource Council, Inc. v. USDA*, 817 F.2d 609 (10th Cir. 1987).

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (while discussion of mitigation is necessary, the agency is not required to formulate and adopt a complete plan to mitigate environmental impact; change in regulations rejecting "worst case approach" imposed by the courts upheld).

Sadler v. 218 Housing Corp., 417 F. Supp. 348, (N.D. Ga. 1976) (all environmental impacts, not just those which have an adverse effect, must be considered).

South Louisiana Envtl. Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980); *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985) (cumulative impacts must be discussed).

Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989) (distinguished *Amoco Prod. Co.*, found that unimpeded bureaucratic inertia may foreclose serious reevaluation of a project after a NEPA violation has been identified, and held that the resulting commitment to the project may constitute irreparable harm to the decisionmaking process that NEPA requires).

Sierra Club v. Morton, 514 F.2d 856, (D.C. Cir. 1975), *cert. denied*, 424 U.S. 901, *rev'd on other grounds*; *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (evaluation of the environmental effects of proposed action must be made before irretrievable commitments are made or options precluded).

Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983); *River Road Alliance, Inc. v. COE of the United States Army*, 475 U.S. 1055 (White, J., dissenting from denial of certiorari); *Gee v. Boyd*, 471 U.S. 1058 (1985) (White, J., dissenting from denial of certiorari) (appropriate standard of review of agency decision against preparing an EIS).

Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983) (analysis of "worst case" scenarios no longer required).

Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011 (2nd Cir. 1983) (EIS has a dual purpose: to ensure informed decisionmaking and to disclose impacts of proposed actions to the public).

State v. Andrus, 483 F. Supp. 255 (D.N.D. 1980) (mere opposition to a project on other than environmental grounds does not force documentation).

Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976) (a proper segment for individual treatment is one with "independent utility" – segments of projects can be separately considered for environmental impacts if they have independent utility and the use or a segmented approach does not preclude an adequate opportunity to consider alternatives).

Weinberger v. Catholic Action of Hawaii / Peace Educ. Project, 454 U.S. 139 (1981); *Laine v. Weinberger*, 541 F. Supp. 599 (C.D. Cal. 1982) (classified information in the EIS).

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (court refused to enjoin a Clean Water Act violation, instead ordering the Navy to apply for a discharge permit).

Wisconsin v. Weinberger, 745 F.2d 412, 424–28 (7th Cir. 1984) (dictum that an injunction should not be the automatic remedy when NEPA is violated).

CHAPTER XXVII

THE COASTAL ZONE MANAGEMENT ACT (CZMA)

2701 REFERENCES

- A. Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451 *et seq.*
- B. National Oceanic and Atmospheric Administration (NOAA) CZMA Regulations, 15 C.F.R. Parts 923, 930
- C. Executive Order 12372; Intergovernmental Review of Federal Programs (July 14, 1982)

2702 SCOPE. This chapter discusses the Coastal Zone Management Act (CZMA), a cross-cutting statute that mandates certain planning efforts for any activity undertaken that could affect any water or land use or any natural resource of the coastal zone. It includes a discussion of how the coastal zone is defined, content of a coastal consistency determination (CCD), and dispute resolution. CZMA issues frequently are closely associated with National Environmental Policy Act (NEPA) issues, which are covered in chapter 26. Controls on nonpoint water pollution must also be considered under section 319 of the Clean Water Act (CWA), which is covered in chapter 12.

2703 BACKGROUND

A. The CZMA, codified at 16 U.S.C. §§ 1451-1464, is designed to protect a relatively small but irreplaceable, and extremely sensitive part of the environment that is facing significant environmental stress from a variety of sources. The authors of the original legislation recognized both the uniqueness of our coastal areas and the concentration of development within a few hundred miles of the ocean's shore. More recently, the 1990 amendments to the CZMA found that almost one-half of our total population now lives in coastal areas and, by 2010, the coastal population will have grown from 80,000,000 in 1960 to 127,000,000 people—an increase of approximately 60%. Population density in coastal counties will be among the highest in the nation. Additionally, research has shown that coastal areas serve as a spawning area for a

large number of marine species and that coastal wetlands serve important water quality, habitat, and flood control functions.

B. Unlike many traditional media-specific environmental laws, the CZMA focuses primary attention on the way that the protected resource, the coastal zone, is actually used. Because of this focus on land use control and economic judgments (matters historically committed to local governments in the United States), application of the CZMA to Federal agencies creates a number of new issues. In 1990, amendments to the CZMA emphasized the need for control of nonpoint water pollution, which also will raise novel land-use issues because nonpoint water pollution control involves application of control measures on a far broader regulated community than previously pursued under the CWA. States are becoming much more active in using the CZMA to control Federal activities.

2704 RELATION TO OTHER STATUTES. The CZMA is a "cross-cutting statute"—it has the potential to apply across a broad range of Department of the Navy (DON) activities.

A. The CZMA does not change the Federal / state allocation of jurisdiction over planning, development and control of water resources, submerged lands, or navigable waters (i.e. the Army Corps of Engineers retains its authority and the states do not gain any mineral rights they did not otherwise own). 16 U.S.C. § 1456(e).

B. Nor does the CZMA modify or repeal existing laws governing operation of Federal agencies. *Id.* National Oceanic and Atmospheric Administration (NOAA) regulations reconcile the consistency obligation (*see* paragraph 2705) with section 1456(e) by requiring Federal agencies, whenever legally permissible, to consider state-management programs as supplemental requirements to be adhered to in addition to existing agency mandates. 15 C.F.R. § 930.32(a).

C. The CZMA does not displace regulation under the Clean Air Act (CAA) or CWA—state coastal programs must incorporate pollution control requirements under those laws into the state program to protect air and water quality. 16 U.S.C. § 1456(f). Nonetheless, the 1990 amendments to the CZMA establish an ambitious Coastal Nonpoint Pollution Control Program that could result in comprehensive controls before similar provisions are adopted under section 319 of the CWA. 16 U.S.C. § 1455b. States with federally approved coastal management programs are obligated to adopt a program to control nonpoint pollution in the coastal zone by July 1995.

2705 JUDICIAL REVIEW. The CZMA does not waive sovereign immunity and does not have a citizen suit provision. Final agency action under the CZMA is reviewable under the Administrative Procedure Act (APA), however, and may result in injunctive relief to ensure that procedural requirements of the CZMA are met. The CZMA has its own unique appeal provision (untested in court), which permits the President to exempt an activity from compliance *after* an adverse decision of a Federal court. 16 U.S.C. § 1456(c)(1)(B). Challenges to agency action under the CZMA typically are joined with challenges under NEPA.

2706 DEVELOPMENT OF A COASTAL ZONE PROGRAM

A. Participation in the coastal zone program is voluntary for states. Each of the 35 coastal states and territories may develop a coastal zone management program for Federal approval. Currently, 29 states and territories have approved programs and five are actively involved in program development. States must prepare a coastal zone management program. Originally the Federal Government provided grants to fund development of state programs. States submit their coastal zone programs to the NOAA, which is part of the Department of Commerce. After considering input from the public and Federal agencies, NOAA approves the program or suggests modification. The state can change its program by submitting the changes for approval. The changes are automatically approved if NOAA takes no action in thirty days. 16 U.S.C. § 1455(e). If NOAA determines that additional comments are required, comments may be received for 120 days. Note that, because NOAA is supposed to "adequately consider" the views of Federal agencies affected by the program, it will be presumed that Federal agencies can comply with the state program as approved. 16 U.S.C. § 1456(b); 15 C.F.R. § 930.32. *See* paragraph 2708, *infra*. Installations in coastal regions and state coordinators should ensure that they stay informed of the current status of the state program and any proposed changes.

B. The content and organization of the state programs vary widely. Some states pulled together a number of existing statutes governing land use in the coastal zone and pollution protection and submitted them as a coastal zone program. For these programs, it is almost impossible to determine what constitutes the state program without examining what was filed with NOAA. Other states passed comprehensive statutory programs and submitted them for approval. These are relatively easy to track in the statutes. For either program, however, it is important to ensure that you have the coastal zone program that has been approved by NOAA, because Federal agencies need not achieve consistency with new provisions of a state's coastal zone program until they are approved by NOAA. The approved program must also identify the state agency that will serve as the single point of contact for serving notice and documents and must indicate the types of activities that are likely to require a CCD. *See* paragraph 2709.C, *infra*.

C. The CZMA, as amended, is designed to protect land and water uses and natural resources of the coastal zone (protected interests). A "land use" means "activities which are conducted in, or on the shorelands within the coastal zone." 16 U.S.C. § 1453(10). A "water use" means "a use, activity, or project conducted in or on waters within the coastal zone." 16 U.S.C. § 1453(18). "Natural resource" is not defined.

D. The state coastal program will include a comprehensive explanation of the state's objectives, policies, and standards to guide public and private uses of the lands and waters of the coastal zone. It will also include "enforceable policies"—those that are legally binding and which allow a state to exert control over the protected interests of the coastal zone. It is the enforceable policies with which Federal activities must be consistent. See paragraph 2708, *infra*.

2707 DEFINING THE COASTAL ZONE

A. Each state defines its own coastal zone within guidelines set by the CZMA. The coastal zone extends seaward as far as the state has jurisdiction under the Submerged Lands Act (SLA). 43 U.S.C. §§ 1301 *et seq.* For most states, this is 3 nm from high water. On Florida's Gulf coast and the Texas coast, the coastal zone extends 3 marine leagues or 10.4 miles. The real difference in coastal zones comes in how far they extend to landward. The CZMA allows states to include within their coastal zones any uplands that "strongly influence" the coastal waters and submerged lands. The state definition of its coastal zone is included in the state's coastal zone management program submitted to NOAA.

B. With regard to Federal lands, the CZMA provides that "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government" are excluded from the coastal zone. 16 U.S.C. § 1453(1). The precise application of this standard to military enclaves is unclear, particularly those portions that are subject to concurrent Federal / state jurisdiction. The importance of whether Federal enclaves are part of a state's coastal zone has been substantially reduced by judicial decision and by amendment.

1. In *California Coastal Com'n v. Granite Rock, Co.*, 480 U.S. 572 (1987), the court held that a private Federal licensee on Federal property was subject to the California coastal zone program because the Federal licensing scheme and the CZMA did not preempt state authority. Thus, a private citizen wishing to undertake an action on Federal land cannot avoid complying with the state coastal zone program because it also has to obtain a Federal license. Although some groups have argued that the case held that the CZMA waived sovereign immunity, the case involved a private party for which no claim of sovereign immunity could be raised.

2. In *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988), the court held that, before dredging submerged state lands and depositing the spoil on other state lands, the Navy had to obtain a state Substantial Development Permit normally associated with the state of Washington's coastal zone program. The court held that, because the Washington coastal zone program contained some provisions respecting the abatement of water pollution, sovereign immunity had been waived under section 313 of the CWA. Even though the Substantial Development Permit primarily included conditions that did deal with water quality, it also included provisions that dealt with traditional land use restrictions unrelated to water quality. The court did not distinguish between the permit provisions, preferring to treat the permit as a whole. This is a controversial decision that is read broadly by some, but narrowly by the Navy. Subsequent decisions will determine whether permits must be treated as monoliths.

3. Finally, the CZMA was amended in 1990. Previously, only activities that "directly affected" the coastal zone were subject to the consistency requirement. In *Secretary of Interior v. California*, 464 U.S. 312 (1984), the court had before it the issue of whether a consistency determination was required for the lease of certain offshore tracts for oil exploration. The tracts all fell outside the state's coastal zone. The court held that consistency did not apply to oil and gas lease sales because the *sales* did not directly affect the coastal zone. Subsequent actions approving actual exploration or development of the field would require additional approvals, which could possibly require a consistency certification. The effect of this decision was to allow the Federal Government to proceed with offshore oil and gas leasing over the strong objection of the states.

C. The 1990 amendments to the CZMA were expressly designed to reverse *Secretary of Interior v. California*, replacing "directly affect" with "affect." 16 U.S.C. § 1456(c)(1)(A). The legislative history makes it clear that "affect" is to be broadly interpreted. It includes effects that are remote in time or location, including cumulative effects. Moreover, the effect need only fall on the interests protected by the CZMA—land or water uses or any natural resource of the coastal zone. The end result is that, even if an activity takes place outside the coastal zone (as in a Federal enclave), so long as it "affects" a protected interest, a consistency determination will be required.

2708 STANDARD. Federal activities that could affect a land or water use, or a natural resource of the coastal zone, must be consistent with the enforceable policies of the approved state coastal zone program "to the maximum extent practicable." 16 U.S.C. § 1456. NOAA sensibly applies a rule of reason to the very broad statutory language, requiring consistency where a Federal activity "reasonably" could affect a protected resource. The regulations define "maximum extent practicable" very strictly—the Federal activity must be fully consistent with the

coastal program "unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations" or if made impossible by unforeseen circumstances that arise after approval of the management program. 15 C.F.R. § 930.32. Failure to comment on a proposed change to a state program does not create unforeseen circumstances. Thus, participation in the NOAA approval process is crucial.

2709 PROCEDURES. If a Federal agency is planning an activity that could affect a protected interest, it must determine whether to prepare a CCD. Similarly, if a Federal agency plans to continue an ongoing activity after an approved change to the state coastal program, it must assess whether a CCD is required.

A. *Determining whether to prepare a CCD.* In determining whether an activity requires a CCD, the Federal agency should consult the state coastal program, which includes a description by the state of the type of projects that could affect the coastal zone. 15 C.F.R. § 930.35. The Federal agency may also receive a request from the state for a CCD for a particular project as a result of a state's monitoring notices of intent in the Federal Register or through the Intergovernmental Review Process established by Executive Order No. 12372. A decision by a Federal agency not to prepare a CCD for an activity that (1) is listed in a state coastal program or the subject of a request by the state; (2) is similar to activities for which CCDs were prepared in the past; or (3) was the subject of a preliminary CCD assessment must be documented and provided to the state at least 90 days before final approval of the project. A general consistency determination may be prepared for recurring or periodic activities. 15 C.F.R. § 930.37. The end result is that, regardless of whether an activity is listed in a state's coastal management program, if the Federal agency determines that an activity could reasonably affect a protected interest, a CCD is required.

B. *Format of the CCD.* The format of the CCD is up to the Federal agency, but it should include a brief statement indicating whether or not the proposed activity will be consistent with the coastal program to the maximum extent practicable, a detailed description of the activity, its associated facilities and their effects on the land and water uses or natural resources of the coastal zone. The CCD is often incorporated into the NEPA documentation, but should be clearly identifiable. The CCD must be prepared before the Federal agency has reached a significant point in its decision making and, at a minimum, must be prepared 90 days before final approval of an activity. 15 C.F.R. § 930.39.

C. *State review.* The CCD (or determination not to prepare a CCD) and supporting information must be provided to the state agency designated in the approved coastal zone program for the purpose. Note that sometimes this will differ from the state agency designated under Executive Order No. 12372 and through

which most NEPA documents are distributed to the state. The state must respond whether it agrees or disagrees with the CCD within 45 days, or must request an extension. A 15-day extension is available on request—subsequent extensions are discretionary, but frequently granted. Oftentimes the first response received will be a request for additional information. If no response is received in the time allotted, the Federal agency may presume agreement (but only if the correct state agency received the CCD). 15 C.F.R. § 930.41.

D. **State disagreement.** If the state disagrees with the CCD, it must explain its reasons and provide any supporting information. It may also suggest alternatives that would bring the activity into consistency. 15 C.F.R. § 930.42. Likewise, if it maintains that additional information is required, it must explain what information is required and why it is necessary to review the CCD.

E. **Mediation.** Either the state or the Federal agency can request mediation of a dispute by the Secretary of Commerce, but both parties must agree to the mediation. 15 C.F.R. § 930.110 and 930.112. The mediation process may require public hearings in the area of the activity. 16 U.S.C. § 1456(h). Informal negotiation through NOAA's Office of Ocean and Coastal Resource Management is also available.

2710 FUTURE DEVELOPMENTS. The CZMA program is already committed by statute to a course that will demand widespread changes in the near future. In addition, the program has been the subject of recent high visibility litigation that may affect the way it is administered.

A. **Coastal zone regulation as a "taking."** State activism in the future may be affected by *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), which involved a fifth amendment "takings" challenge to restrictions on beachfront development. The court held that the state could not merely declare that a particular use was contrary to the public interest, but must make a showing that the limits on development imposed by the state law were rooted in background principles of nuisance and property law. The inquiry should include the degree of harm to public lands and resources, or adjacent private property, posed by the developer's proposed use, the social value of the use, and the relative ease with which the alleged harm can be avoided. On remand, the state was unable to carry its burden of proof and ultimately had to compensate Mr. Lucas for his property. This decision may trim state activism altogether, or may refocus attention on Federal activities because limits on Federal activities will not generate "takings" claims. It is sure to keep alive the debate between property rights and the state's right to regulate activities.

B. ***Development of nonpoint pollution program.*** EPA issued *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* on January 14, 1993, as required by the 1990 amendments to the CZMA. This triggered a number of deadlines:

JUL 95	States must submit Coastal Nonpoint Pollution Control programs to EPA and NOAA
JAN 96	Agency review complete
JAN 99	Management programs must be fully implemented

Many states already have programs under development. Commands must stay aware of program status within their state because many measures that restrict nonpoint pollution have significant potential for impacts on operations and training. The investment of time and resources during program development is far more effective than trying to correct measures that do not account for unique military requirements after a program is in place.

C. ***Revision of regulations.*** NOAA plans to propose updated CZMA regulations within the next year. Commands should be prepared to assess and comment on the impact of the draft regulations, especially on any impact on the ability to conduct operations, exercises, or training.

2711 CZMA POINTS OF CONTACT

- A. Navy: CNO N-44(EP) - (703) 325-7344
- B. USMC: CMC (CL) - (703) 614-2150
- C. NOAA: Office of Ocean and Coastal Resource Management,
Federal Consistency Coordinator - (301) 713-3098

CHAPTER XXVIII

ENDANGERED SPECIES PROTECTION

2801 REFERENCES

- A. Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*
- B. Regulation of Endangered and Threatened Wildlife and Plants, 50 C.F.R. §§ 17.1 *et seq.*
- C. Regulation Governing Endangered Fish or Wildlife (NMFS), 50 C.F.R. Part 222, Threatened Fish and Wildlife (NMFS), 50 C.F.R. Part 227
- D. Joint Regulations (FWS and NMFS) Implementing The ESA, 50 C.F.R. §§ 401 *et seq.*
- E. DOD DIR. 4700.4, Subj: NATURAL RESOURCES MANAGEMENT PROGRAM
- F. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 19
- G. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 17
- H. MCO P11015.4C, Subj: THE ENDANGERED SPECIES ACT OF 1973

APPENDICES

- (A) Wildlife Protection Cases
- (B) Wildlife Protection Checklist
- (C) ESA Section 7 Consultation Process

2802 INTRODUCTION

A. Administration of the Endangered Species Act (ESA) is by the U.S. Fish and Wildlife Service (FWS)(Department of Interior) for terrestrial biology and the National Marine Fishery Service (NMFS)(National Oceanic and Atmospheric Administration (NOAA) Department of Commerce) for marine biology. However, some species are regulated by both FWS and NMFS. For example, FWS has jurisdiction over sea turtles on land and NMFS has jurisdiction over them at sea. See 50 C.F.R. § 222.23.

B. Endangered and threatened animal species are listed at 50 C.F.R. § 17.11; endangered and threatened plants are listed at 50 C.F.R. § 17.12.

C. The ESA prohibits the importation, exportation, and taking of endangered and threatened species of plants and animals. Also, the ESA requires federal agencies to consult with FWS / NMFS prior to taking any action which might jeopardize the continued existence of endangered or threatened species. The "taking" of any endangered fish or wildlife species and the removal or destruction of any endangered plant species is prohibited. Agencies are required to avoid damaging critical habitat, to take positive steps to improve such habitat, and to act to conserve and restore endangered and threatened species.

D. The ESA has had a significant impact on the Department of the Navy (DON), which manages lands, and conducts operations that may affect endangered species. Navy attorneys, civilian and military must have a fundamental understanding of this law and be prepared to properly advise their clients. Failure to do so may result in delayed construction activity, curtailed operations, as well as civil and criminal penalties.

E. This chapter focuses on ESA, the primary wildlife protection statute. Do not be confused by state endangered species law. Sovereign immunity has not been waived. However, it is Navy policy to encourage cooperation with states and territories in the protection of rare and endangered species listed by state and / or territorial agencies. Other related statutes are discussed in Chapters 29 and 31. A case list (appendix A) and a checklist (appendix B) are located at the end of this chapter to further aid the reader.

2803 DEFINITIONS (16 U.S.C. § 1532; 50 C.F.R. § 424.02)

A. "*Endangered species*" means a species in danger of extinction throughout all or a significant portion of its range. Listing is based solely on biological criteria derived from the best scientific and commercial data available.

B. **"Threatened species"** means a species likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Listing is based on biological criteria from the best scientific and commercial data available.

C. **"Critical habitat"** consists of specific areas in which are found those physical or biological features essential to the conservation of the species and which may require special management consideration or protection. EPA designation of critical habitat must take into consideration the economic impact of such designation. Maps of critical habitat for fish and wildlife and also for plants are found at 50 C.F.R. §§ 17.95, 17.96, 226.11 and 226.71.

D. **"Take"** means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct" and any habitat destruction that could result in the killing of an endangered / threatened species. In the context of plants, it is unlawful to remove, take, cut, dig up, or destroy protected plant species in areas under Federal jurisdiction.

E. **"Incidental taking"** means a "taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of any otherwise lawful activity."

F. **"Action"** means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (1) actions intended to conserve listed species or their habitat; (2) the promulgation of regulations; (3) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (4) actions directly or indirectly causing modifications to the land, water, or air.

G. **"Major construction activity"** is a construction project or other similar activity on a scale that affects the quality of the human environment as referred to in the National Environmental Policy Act (NEPA).

H. **"Conserve"** means to use all means necessary to bring an endangered / threatened species to the point where the protection of the ESA is no longer needed. However, the Ninth Circuit ruled that the duty to conserve does not require the agency to adopt the course of action "least burdensome" to the endangered / threatened species. *Pyramid Lake Paiute Tribe v. Dep't of Navy*, 898 F. 2d 1410 (9th Cir. 1990).

2804 AFFIRMATIVE DUTIES UNDER ESA. The commander's affirmative duties under the ESA are detailed at 16 U.S.C. § 1536. They are:

1. Developing programs to conserve listed species.
2. Ensuring that agency action is not likely to jeopardize the continued existence of any listed species directly or indirectly, by reducing its reproduction, numbers, or distribution.
3. Ensuring that agency action is not likely to result in the destruction or adverse modification of critical habitat, including any alterations which adversely modify a physical or biological feature that was the basis for its designation as critical. If an area on the installation is designated "critical habitat," the commander has a duty to protect the critical habitat even if the threatened or endangered species is not present on the installation.
4. "Consulting" (formally or informally) with the appropriate Service (FWS or NMFS) whenever the commander:
 - a. Carries out a required program for the conservation of a listed species, or
 - b. Anticipates taking any action that may impact on a listed species or its habitat.
 - c. Agencies must consult with FWS, Department of Interior, whenever their actions adversely affect an endangered species or threatened species within the United States. Consultations must occur with NMFS, NOAA Department of Commerce, for actions affecting endangered or threatened species on the high seas.
 - d. Appendix C depicts the consultation process.
5. Preparing a biological assessment regarding endangered species if the proposed action is a "major construction activity."
6. "Conferring" with the Service whenever a proposed action is likely to jeopardize any species proposed to be listed under the ESA or result in the destruction or adverse modification of critical habitat proposed to be designated for the species.
 - a. These conferences may be informal in nature; the Service may make advisory recommendations.

b. These discussions should assist commanders in determining whether consultation will be necessary if the species is listed, in preparing any comments on the designation of "critical habitat," and in otherwise planning for the possible listing of the species.

2805 CONSULTATION PROCEDURES

A. *Biological assessments*

1. ***When required.*** Federal agencies must consult with the FWS to ensure that any agency action is not likely to jeopardize the preservation or critical habitat of any endangered or threatened species.

a. This covers both agency projects and any private activity which requires some type of Federal permit to proceed (e.g., water projects, highways, wetlands, harbor projects, etc.).

b. If the Secretary of Interior advises that a listed or proposed-to-be listed species may exist in an area, a biological assessment must be conducted. 16 U.S.C. § 1536(c).

2. ***Procedure.*** "Biological assessment" refers to the information prepared by (or under the direction of) the Federal agency concerning the protected species and critical habitat in the action area and the evaluation of potential effects of the action on such species and habitat.

a. If the biological assessment concludes that an endangered species is likely to be affected by the proposed action, formal consultation with FWS must occur.

b. The agency is prohibited from making an irretrievable commitment of resources to the project during the consultation process. 16 U.S.C. § 1536(d).

B. *Biological opinion*

1. ***Defined.*** "Biological opinion" is the FWS document, issued at the conclusion of the consultation, that opines whether the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b).

2. ***Possible findings.*** A biological opinion can result in three possible findings:

a. The proposed action will not violate the ESA; the commander may proceed with the proposed action.

b. The proposed action will violate the ESA and there are no prudent alternatives; the action may not proceed.

c. There are reasonable and prudent alternatives to the action proposed that would not violate the ESA. Adoption of the suggested mitigation is a common method of avoiding conflicts between Federal actions and endangered species protection.

C. ***Incidental takings.*** If the biological opinion concludes that the proposed action will not violate the ESA or that there are reasonable and prudent alternatives which would not violate the ESA *and* that the "taking" of a listed species would not violate the ESA, the Service provides an "Incidental Take Statement" (ITS) with the biological assessment. 16 U.S.C. § 1536(b).

1. ***Requirements.*** The applicant must show:

a. The taking will be incidental;

b. the steps the applicant will take to minimize and mitigate impacts of the taking to the maximum extent practicable;

c. that adequate funding for the plan exists; and

d. that the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild.

2. ***Contents.*** The ITS specifies:

a. The impact of the incidental taking on the species;

b. the measures necessary or appropriate to minimize the impact of the taking; and

c. the measures the commander must implement to minimize the impact of the taking.

3. **Command action.** The commander *is not* absolutely bound by the FWSs biological opinion.

a. Commanders who deviate from the recommended alternatives, however, enjoy no protection from the opinion's ITS.

b. Any taking without the protection of an ITS or a permit will be a violation of the ESA which can result in either criminal or civil liability.

c. If there is no incidental taking as a result of the commander's deviation from the biological opinion, the commander will not be in violation of the ESA if "alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species" are taken.

D. **The exemption process.** Though rarely used (only three times in 15 years with minor success), projects may be exempted from the anti-jeopardy requirements of ESA, if the Endangered Species Committee, after notice and hearing, makes a finding that:

1. There are no reasonable and prudent alternatives to the agency action;

2. the benefits of action clearly outweigh the benefits of alternative course of action consistent with conserving the species, and such action is in the public interest;

3. the action has regional or national significance;

4. there has been no irretrievable commitment of resources;

5. necessary and appropriate mitigation and enhancement measures are established; and

6. it is determined that consultation was carried out in good faith and any required assessments were completed. 16 U.S.C. § 1536(e). 50 C.F.R. pt. 453.

2806 ESA ENFORCEMENT (16 U.S.C. § 1540)

A. Federal action

1. **Civil penalties.** Each knowing violation can result in penalties of up to \$25,000.00. Negligent violations can result in penalties of up to \$500.00 per violation. Government employees are not immune.

2. ***Criminal penalties.*** Department of Justice (DOJ) can pursue criminal charges against a Federal employee for violation of the ESA. No specific intent to violate the ESA is required. Maximum penalty is one (1) year and / or a \$50,000.00 fine per violation.

3. Both civil and criminal sanctions can be sought for commission of prohibited acts or failing to act as prescribed by law.

B. *Citizen suits*

1. "[A]ny person may commence a civil suit . . . to enjoin any person, including the United States. . . ." 16 U.S.C. § 1540(g).

2. The standard of review of the commander's decision is the Administrative Procedures Act (APA) "arbitrary or capricious standard." Application of the APA standard, however, must be accomplished consistent with the commander's responsibility to use "all methods and procedures which are necessary to prevent the loss of any endangered species, regardless of cost."

3. Courts may award costs of ESA litigation to either party.

2807 COOPERATION WITH STATES AND PRIVATE GROUPS. Federal agency cooperation with the states is mandated in section 6 of the ESA (16 U.S.C. § 1535). Although Federal restrictions on "taking" preempt state regulations, the state can play a major role in endangered species protection. By cooperative agreements, states undertake a role in conserving and managing resident endangered and threatened species if they submit a management plan which meets the criteria of section 6(c). Once the plan is approved by FWS, states become eligible for funding for the plan. The states are prohibited from permitting what is prohibited by the Act, but may establish more restrictive regulations than Federal regulations.

APPENDIX A

WILDLIFE PROTECTION CASES

Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988) ("taking" can include destruction of habitat).

Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy, 898 F.2d 1410 (9th Cir. 1990) (whether an agency must adopt the proposal that would most benefit an endangered species).

Roosevelt Campobello International Park Com. v. EPA, 684 F.2d 1034 (1st Cir. 1982); *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359 (5th Cir. 1976) (agencies which reject FWS advice and alternatives yet proceed with the project will bear a heavy burden in court if the action is challenged).

TVA v. Hill, 437 U.S. 153 (1978) (court prohibited completion of the Tellico Dam because of known jeopardy to the endangered snail darter fish; standard of review and its application; resulted in creation of exemption process).

United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987); *United States v. St. Onge*, 676 F. Supp. 1044 (D. Mont. 1988) (specific intent not required to violate the ESA).

Tribal Village of Akutan v. Hodel, 859 F.2d 651 (9th Cir. 1988) (commander's deviation from the biological opinion will not be in violation of the ESA if he takes "alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species" and there is no incidental taking).

The American Bald Eagle v. Bhatti, 9 F.3d 163 (1st Cir. 1993) (standard for establishing taking of species required showing of actual harm, rather than any numerical probability of harm).

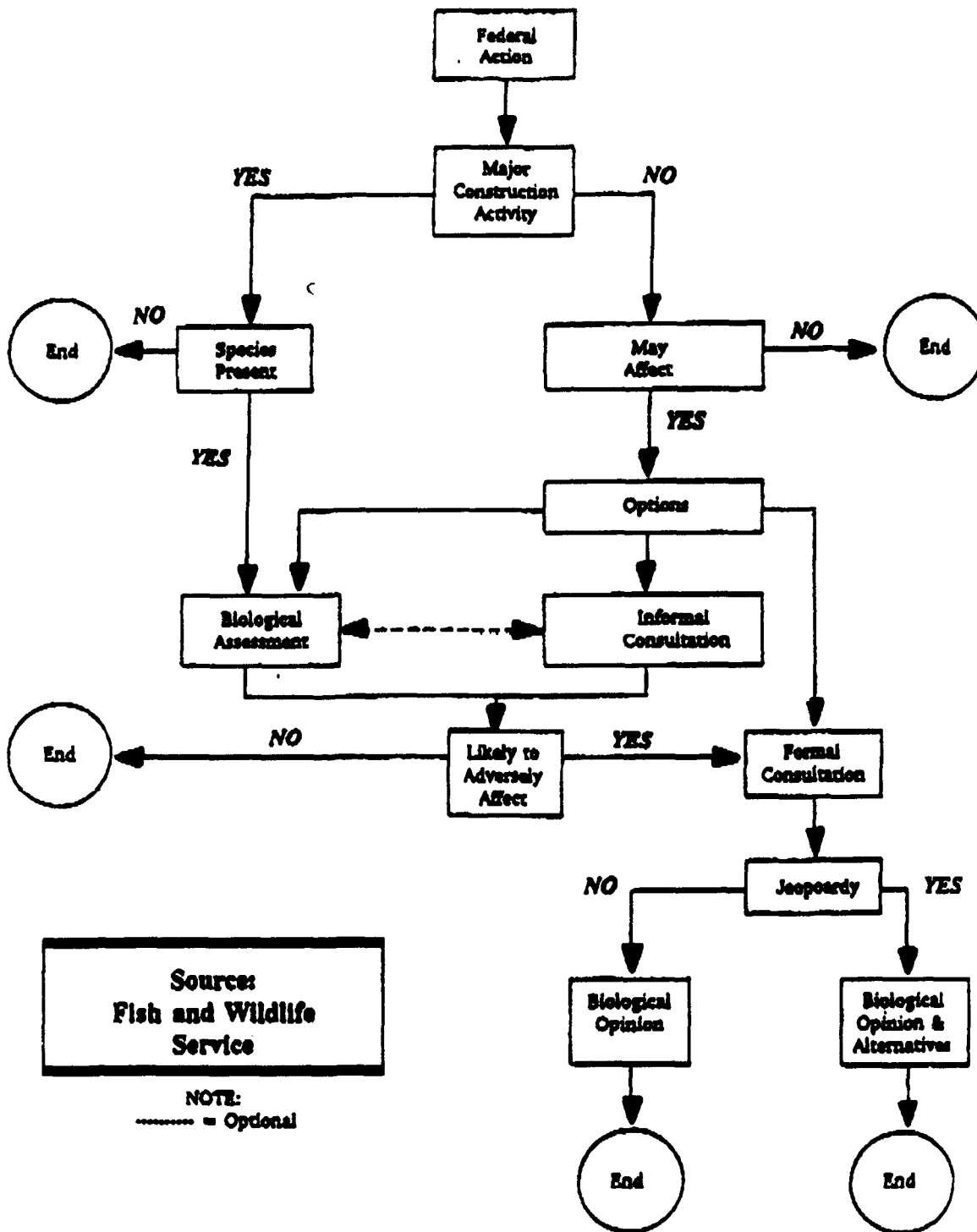
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APPENDIX B

WILDLIFE PROTECTION CHECKLIST

- _____ Has the command identified the presence of endangered or threatened species (designated or proposed) on the installation?
- _____ Has the command identified the presence of critical habitat on the installation, regardless of whether inhabited?
- _____ If endangered species are present, has a "no jeopardy" opinion been issued?
- _____ Has the command developed a coordinated program for planning construction and training activities for possible effects on proposed and listed species?
- _____ Has the command informally consulted with the listing service on a regular basis?
 - _____ With state agencies?
 - _____ With private interest groups?
- _____ Are there qualified professionals on the installation who know wildlife and can administer the law?
- _____ Has the commander's interests in wildlife protection been safeguarded through education and enforcement at all levels of command?

ESA Section 7 Consultation Process



CHAPTER XXIX

WILDLIFE PROTECTION

2901 REFERENCES

- A. Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. §§ 1361 *et seq*; 50 C.F.R. Part 18; 50 C.F.R. §§ 216-220, 228
- B. Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 *et seq*; 50 C.F.R. Part 13; 50 C.F.R. Parts 20,21
- C. Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 *et seq*; 43 C.F.R. Part 4700
- D. Sikes Act (Conservation Programs on Government Lands), 16 U.S.C. § 670a *et seq*.
- E. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, Ch. 19
- F. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 17

APPENDIX

- (A) Wildlife Protection Cases

2902 MARINE MAMMAL PROTECTION ACT. The purpose of the Marine Mammal Protection Act of 1972 (MMPA) is to prohibit the "taking" of marine mammals by U.S. citizens unless the marine mammals are taken under the authority of a Federal permit. The MMPA defines the term "take" as meaning "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." Because the term is defined broadly, many otherwise lawful activities can amount to a taking and, thus, require an MMPA permit or letter of authorization (LOA). 16 U.S.C. § 1362(12).

Consolidated Environmental Law Deskbook

A. The MMPA defines the term "person" to include "any officer, employee, agent, department, or instrumentality of the Federal Government" and thus applies to those activities of the Federal Government that may result in marine mammal "takes." 16 U.S.C. § 1362(9). Marine mammals include whales, dolphins, porpoises, seals and sea lions (for which the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS) are responsible, 50 C.F.R. § 218.3), and sea otters, walruses, manatees, and polar bears (for which the Fish and Wildlife Service (FWS) is responsible, 50 C.F.R. § 18.3).

B. The Secretaries of Interior and Commerce may allow the "incidental," but not the "intentional," taking of small numbers of marine mammals by U.S. citizens (including Federal activities) in a particular geographic region who are engaged in a specific activity. An incidental take means an accidental taking; it does not mean that the taking is unexpected, but rather it includes those takings which are infrequent, unavoidable, or accidental.

C. LOAs for incidental takes of small numbers of marine mammals in association with specified activities involve a lengthy process of public rulemaking and the development of information about affected species. Such LOAs are frequently subject to litigation initiated by environmentalists and animal rights organizations.

D. Research permits are required to conduct research on or with marine mammals.

E. Under 10 U.S.C. § 7524, DOD is authorized to take not more than 25 marine mammals per year for national defense purposes. Any such taking must be concurred in by the Secretary of Commerce after consultation with the Marine Mammal Commission. The animals taken pursuant to this provision must be treated humanely under conditions established by the Secretary of Commerce. Also, DOD cannot take listed endangered or threatened species.

F. *Progressive Animal Welfare Society [PAWS] v. Department of the Navy*, 725 F. Supp. 475 (W.D. Wash. 1989) illustrates the sensitivity of marine mammal issues and the types of challenges that will be mounted to any activity that involves takings, whether pursuant to 10 U.S.C. § 7524 or under the MMPA.

G. Enforcement mechanisms under the MMPA include civil penalties of \$10,000.00 for a each violation and criminal penalties of confinement of one (1) year and a \$20,000.00 fine per violation. 16 U.S.C. § 1375(b).

2903 MIGRATORY BIRD TREATY ACT. The Migratory Bird Treaty Act (MBTA) makes it unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, [or] possess . . . any migratory bird, [or] any part, nest, or egg of any

such bird. . . ." 16 U.S.C. § 703. Violations of the taking prohibition may be criminal acts. Although the Navy is only infrequently concerned with the Act, we do occasionally take some action which necessitates caution with respect to migratory birds. In this regard, it is important to note that the Act's criminal sanctions may be imposed upon individuals, that simply removing a nest can constitute a taking, and that Federal officers and employees are not excused from compliance with the Act by virtue of their official status.

A. The birds covered are very extensive, including for example: waterfowl (e.g., ducks, geese, swans); cranes (e.g., whooping and sandhill); rails and coots; shorebirds (e.g., plovers, sandpipers, snipe, woodcock); doves and wild pigeons; and insect eaters (e.g., catbirds, robins, martins, hummingbirds, and warblers) (50 C.F.R. § 10.13). No Federal protection for blackbirds, grackles, cowbirds, crows, and magpies creating a health hazard or nuisance (50 C.F.R. § 21.43). No permit is required to scare or herd depredating migratory birds (not including endangered species or bald or golden eagles).

B. Two incidents show the types of actions that can lead to trouble under the MBTA. One involved a tree-trimming project at a naval installation. The project was necessary because a species of migratory bird was nesting in trees overhanging streets, sidewalks, and yards at the station, resulting in unsanitary conditions on the ground. In the course of the project, a number of nests were destroyed and several birds were injured or killed. The FWS investigated and gave serious consideration to criminal prosecutions, although no charges were ever filed against the individuals who participated in or directed the work. On another occasion, a need was identified to remove uninhabited swallows' nests from under the eaves of Navy buildings for sanitation purposes. Since the birds were protected by the MBTA, removal of the nests would have constituted a "taking."

C. The MBTA authorizes the issuance of "taking" permits. Any activity which could result in damage to nests or injury to birds must be carefully reviewed to determine whether the MBTA and a permit requirement applies.

D. Under 16 U.S.C. § 707, violation of any provision of the MBTA or regulation issued under the authority of the MBTA carries misdemeanor punishments of six (6) months imprisonment or a \$500.00 fine. A violation of the MBTA with the intent to sell carries a felony punishment of two (2) years imprisonment and a \$2,000.00 fine.

2904 WILD FREE-ROAMING HORSES AND BURROS ACT. The Wild Free-Roaming Horses and Burros Act protects wild horses and burros that roam the American West. In 1971, Congress found that these animals are "living symbols of the historic and pioneer spirit of the West," declared that they "shall be protected from capture, branding, harassment, or death," and directed that "they are to be

Consolidated Environmental Law Deskbook

considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331.

A. Although the prohibitions apply for the most part to wild horses and burros on public lands, which are defined as those lands administered by the Departments of Interior or Agriculture, the Act occasionally comes into play on Navy lands when wild horses or burros take up residence. Because the Act prohibits any malicious harassment of the animals, including attempts to round them up or herd them, removal of such animals is a problem. The Act provides for Department of the Interior removal of such animals at the request of the property owner or to maintain an ecological balance. See *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986). Thus, the Navy cannot take steps to rid itself of the animals without Interior's concurrence as to proposed removal methods.

B. Efforts to control populations of wild horses and burros on Navy land must be undertaken with extreme caution; any control measures will almost certainly arouse public emotion. Careful consideration should therefore be given, and control proposals will likely require compliance with the National Environmental Policy Act (NEPA).

C. The Wild Free-Roaming Horses and Burros Act carries criminal penalties of one (1) year imprisonment and a \$2,000.00 fine for willfully removing the covered animals from public lands. 16 U.S.C. § 1338.

2905 SIKES ACT. The Sikes Act requires each military installation to manage natural resources so as to provide for multipurpose uses and to provide public access appropriate for those uses, unless access is inconsistent with the military mission. Military installations with fish, wildlife, and outdoor recreation resources must manage such resources with the appropriate Federal and state fish and wildlife agencies under a cooperative plan. Installations cannot legally allow trapping, hunting, fishing, or collect fees for these activities without a cooperative management plan. 16 U.S.C. § 670h(c).

A. The Sikes Act authorizes cooperative agreements with state and local governments and nonprofit organizations to provide for the maintenance and improvement of natural resources on, or to benefit natural and historic research on, naval installations.

B. In 1993, Congress expressed concern that DOD installations were not developing integrated natural resources management plans and funding them adequately. Proposed amendments to the Sikes Act would give either the FWS or the military natural resources managers greater authority to enforce fish and wildlife laws on military installations, including the requirements of natural resources management plans.

APPENDIX A

WILDLIFE PROTECTION CASES

Curnutt v. Holk, 230 Cal. App. 2d 580 (1964) (if commanders permit hunting by the public, they must follow state law).

Hughes v. Oklahoma, 441 U.S. 322 (1979), overruling *Geer v. Connecticut*, 161 U.S. 519 (1896) (state regulation of wild animals and fish is subject to constitutional limitations).

Kleppe v. New Mexico, 426 U.S. 529 (1976) (congressional power to regulate wildlife on public lands).

United States v. Engler, 806 F.2d 425 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1019; *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985) (mental element in Migratory Bird Treaty Act).

United States v. FMC Corp., 572 F.2d 902 (2nd Cir. 1978) (broad definition of taking under Migratory Bird Treaty Act).

CHAPTER XXX

NATIONAL MARINE SANCTUARIES

3001 REFERENCES

- A. Title III, Marine Protection, Research & Sanctuaries Act (MPRSA), 16 U.S.C. §§ 1431 *et seq.*
- B. National Marine Sanctuaries Program Regulations, 15 C.F.R. Part 922

3002 PURPOSE. The National Marine Sanctuaries Program (NMSP) seeks to promote comprehensive management of special ecological, historical, recreational and aesthetic resources in the marine environment. These protected waters provide a secure habitat for species close to extinction, and protect historically significant shipwrecks and prehistoric artifacts. The sanctuaries also are recreational spots for diving and sportfishing, and support valuable commercial industries such as fishing and kelp harvesting. The Marine & Estuarine Management Division, National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce administers the Marine Sanctuaries Program. It is charged with balancing these multiple uses of scarce resources.

3003 DESIGNATION PROCEDURE

- A. Designation under the MPRSA.
 - 1. NOAA maintains the Site Evaluation List (SEL) candidate locations for selection as marine sanctuaries. Reference (b) lists the criteria for listing on the SEL.
 - 2. When NOAA makes a preliminary assessment that a SEL site meets the regulatory designation standards, it becomes an Active Candidate for designation. A notice of intent to prepare a draft environmental impact statement (DEIS) is published in the Federal Register. In conformity with the National Environmental Policy Act (NEPA), NOAA will hold public scoping hearings and solicit

written comments on the development of the DEIS, the draft designation document, and the draft management plan.

3. It is critical that counsel becomes involved at the earliest possible moment to assist in the development of the plans and regulations to avoid any adverse impacts on the Department of Defense (DOD) operations. It has been through the initiative of counsel that most, but not all, marine sanctuaries have specific national defense exceptions. Documentation should be submitted to describe all operations that are currently taking place within the area. Comments should be coordinated with area and regional coordinators, and Chief of Naval Operations (CNO) N44EP. This information helps educate NOAA and the public about DOD activities. More importantly, it lays the foundation to have these activities "grandfathered." Counsel must stay engaged throughout the development process to avoid having the exemptions deleted during the rule-making.

4. Ultimately, NOAA will prepare a final environmental impact statement, a designation document, a management plan, and regulations governing activities within the sanctuary. A prospectus is also delivered to Congress. Congress or the Governor of an affected state can "veto" the designation. But see *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (unconstitutionality of Congressional vetoes).

B. **Congressional designation.** Recently, Congress has taken the initiative to designate additional marine sanctuaries through special legislation. The regulatory process commences with scoping meetings for the DEIS and continues as described above. Active attorney involvement is still required.

3004 EFFECT OF DESIGNATION

A. Designation and the implementing regulations generally operate to restrict uses incompatible with the preservation of sanctuary values, e.g., coral, marine mammals, etc.

B. Designation does not constitute any claim to territorial jurisdiction on the part of the United States for designated sites beyond the U.S. territorial sea. Regulations implementing the designation are applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party. With limited exceptions, regulations do not apply to a person who is not a citizen, national, or resident alien of the United States.

C. Designation does not terminate valid preexisting leases, permits, licenses or rights, but does subject them to regulation. Most, but not all, of these regulations

address DOD activities in the sanctuaries. 15 C.F.R. §§ 924, 929, 935-38, and 941-44. Review the regulations specific to the sanctuary involved. Contact NOAA if questions remain unanswered.

D. Strict liability exists for damages and response costs for injuries to sanctuary resources. Violation of the regulations or conditions of special use permits can result in assessment of civil penalties of up to \$100,000.00 per violation (both personal and in rem against the vessel) and forfeiture of the vessel.

3005 EXISTING SANCTUARIES. Marine sanctuaries range in size from a few acres to thousands of square miles. They include:

- A. Channel Islands, off Santa Barbara, California (15 C.F.R. Part 935)
- B. Cordell Bank, off San Francisco, California (15 C.F.R. Part 942)
- C. Fagatele Bay, American Samoa (15 C.F.R. Part 941)
- D. Key Largo, Florida Keys (15 C.F.R. Part 929)
- E. Looe Key, Florida Keys (15 C.F.R. Part 937)
- F. Flower Garden Banks, off Texas-Louisiana border (15 C.F.R. Part 943)
- G. Gray's Reef, off Sapelo Island, Georgia (15 C.F.R. Part 938)
- H. Gulf of the Farallones, NW of San Francisco (15 C.F.R. Part 935)
- I. Hawaiian Islands Humpback Whale
- J. USS Monitor, off Cape Hatteras, North Carolina
- K. Monterey Bay, off central California (15 C.F.R. Part 944)
- L. Stellwagen Bank, off Cape Cod, Massachusetts

3006 PROSPECTIVE SANCTUARIES. NOAA's site evaluation list describes 25 sites with significant natural resource values which are to be considered as candidate sites for designation as national marine sanctuaries. Active Candidates include:

- A. Norfolk Canyon, off the Chesapeake Bay

Consolidated Environmental Law Deskbook

- B. Northwest Straits, just north of Whidbey Island
- C. Olympic Coast, off Washington State
- D. Thunder Bay, north of Michigan

CHAPTER XXXI

WILDLIFE REFUGES AND WILDERNESS

3101 REFERENCES

- A. The National Wildlife Refuge System Administration Act (NWRSA), 16 U.S.C. §§ 668dd *et seq.*
- B. The National Wildlife Refuge System Regulations, 50 C.F.R. §§ 25-35
- C. Wilderness Act, 16 U.S.C. §§ 1131 *et seq.*
- D. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCE PROGRAM MANUAL, Ch. 19
- E. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 17

3102 OVERVIEW. The National Wildlife Refuge System (NWRS) was established to bring together the authorities relating to the various categories of areas administered by the Secretary of the Interior, through the U.S. Fish and Wildlife Service (FWS) for the protection and conservation of fish and wildlife, including wildlife refuges, game and wildlife ranges, wildlife management areas, and waterfowl production areas. Also, the Wilderness Act established a program to set aside public lands in their nature, pristine state, lands unscarred by man's development

3103 DESIGNATION PROCEDURES. The Secretary of the Interior is authorized to acquire lands for the NWRS. Areas within the system which have been designated by law, Executive order, secretarial order, or included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any Federal department or agency continue to be a part of the system until otherwise specified by Act of Congress. This limitation, however, does not preclude the transfer or disposal of acquired lands no longer needed for the purposes for which the system was established and for which the Secretary recovers the acquisition cost

or the fair market value. It also does not preclude the disposal of any lands pursuant to the terms of any cooperative agreement with a Federal agency. 16 U.S.C. § 668dd(a).

3104 REGULATIONS. The most important thing to know about a wildlife refuge is that uses of the refuge must be compatible with the major purposes for which the refuge was established. The decision as to whether a proposed use is compatible rests with the Secretary of the Interior, who has delegated this authority to the refuge managers, and, as a rule, such managers tend to regard most military uses as incompatible with the purpose of refuges. Some refuge managers have asserted their right to restrict military overflights of refuges, although the Federal Aviation Authority (FAA) and DOD have challenged this authority. Unless the Department of the Interior permits a proposed use of a refuge, it is illegal to knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property in the refuge or to take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals, or parts, nests or eggs thereof. 16 U.S.C. § 668dd(c). There are criminal penalties for unlawful takings within a refuge (six (6) months imprisonment and / or \$500.00 fine). 16 U.S.C. § 668dd(e).

3105 OVERLAY REFUGES. Existing Federal lands are prime candidates for wildlife refuges. When refuges are created on lands under the control of another Federal agency, which continues to occupy those lands, the refuges are called overlay refuges. Overlay refuges are created in a number of ways. Sometimes Congress establishes the refuge on existing Federal lands, sometimes the Department of the Interior may approach another agency about an overlay refuge, or sometimes a landholding agency, such as the Department of the Navy, will suggest the creation of an overlay refuge or wildlife management area in order to avoid the designation of critical habitat for a threatened or endangered species.

A. Once created, a refuge is difficult to undo. Nevertheless, naval installations considering the creation of an overlay refuge through a cooperative agreement with the Department of Interior's FWS are advised to include a provision in the cooperative agreement that reserves the Navy's right to withdraws lands from the refuge.

B. Because uses of refuges must be compatible with the purposes for which they were established, any cooperative agreement establishing an overlay refuge on Navy lands should include the use of the land for support of the military mission as one of the primary purposes of the refuge.

C. Funding FWS' efforts in wildlife management, surveys, monitoring, and other activities may be an issue in an overlay refuge. Because funds are not always available for these efforts, the cooperative agreement with FWS should make any commitment subject to the availability of funds.

D. Several bills that would create overlay refuges have been introduced in Congress. DOD's concerns include ensuring that any such legislation grandfather existing uses of refuges from any requirement for a compatibility determination by the Secretary of the Interior. Further, DOD has sought special provisions exempting military overflights from control by refuge managers.

3106 WILDERNESS ACT. The Wilderness, 16 U.S.C. §§ 1131 *et seq.*, Act created the natural wilderness preservation system to maintain some lands in their nation condition. "Wilderness" features include: area generally appears to have been affected primarily by forces of nature; area affords outstanding opportunities for solitude and unconfined type recreation; at least 5000 acres of land or is of sufficient size to make its preservation practicable; and other features of scientific, archaeological, ecological, geological, scenic or historical value. 16 U.S.C. § 1131(c).

A. These wilderness areas are devoted to limited recreation, scientific, and educational use. Conservation and preservation are the overriding goals. Except as needed to monitor and administer the lands, motor vehicles, aircraft landings, motorboats, and buildings are prohibited. 16 U.S.C. § 1133(c).

B. Future designations of public lands as "wilderness areas" could affect military operations and training, especially low-level flight restrictions. Naval installations should monitor efforts to reclassified adjacent public lands in order to protect current training and operational practices.

CHAPTER XXXII

**LAND MANAGEMENT FOR NATURAL
RESOURCE PROTECTION**

3201 REFERENCES

- A. Natural Resources Management (NRM) Program, 32 C.F.R. § 265
- B. OPNAVINST 5090.1A,; Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROTECTION MANUAL, Ch. 19
- A. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Chs. 17 and 18
- B. NAVFACENGCOM Manual P-73, Vol. II, Navy Natural Resources Management Procedural Manual (NRMPM)

3202 POLICY. The policy of the Department of the Navy (DON) is to act responsibly in the public interest to restore, improve, preserve, and properly use natural resources on DON administered lands. There shall be a conscious and active concern for the inherent value of natural resources in all DON plans, actions, and programs.

A. Stewardship of natural resources shall be an important and identifiable function of all echelons of command management. Each command shall establish procedures to ensure DON decision-makers are kept informed of the conditions of natural resources, the objectives of Natural Resource Management (NRM) Programs, and potential conflicts between DON actions or plans with established policies.

B. Natural resources under the jurisdiction of the Department of the Navy shall be managed to support the military mission, while practicing the principles of multiple use and sustained yield, using scientific methods and an interdisciplinary approach. Additionally, public access appropriate for those multiple uses shall be provided to the extent that the uses are not inconsistent with the mission. The conservation of natural resources and the military mission need not and shall not be

Consolidated Environmental Law Deskbook

mutually exclusive. Commands shall accomplish the following when managing natural resources on Department of the Navy lands:

1. Assign specific responsibility, centralized supervision, and qualified personnel to this program; and encourage appropriate staff personnel to participate in NRM job training activities and professional meetings.
2. Protect, conserve, and manage the watersheds, wetlands, natural landscapes, soils, forests, fish and wildlife, and other natural resources as vital elements of an optimum natural resources program.
3. Manage natural resources to provide outdoor recreation opportunities. This shall be recognized as an important objective in the conduct of all DON NRM Programs.
4. Use and care for natural resources in the combination best serving the present and future needs of the United States and its people.
5. Provide for the optimum development of land and water areas and access thereto while maintaining ecological integrity.
6. Increase the function and value of DON wetlands.

3203 NATURAL RESOURCES MANAGER. Each land managing activity shall appoint, in writing, an installation natural resources manager. The natural resource manager will ensure the commanding officer (CO) is informed regarding:

- A. Natural resources issues;
- B. conditions of natural resources;
- C. objectives of NRM plan sections; and
- D. potential or actual conflicts between mission requirements and natural resources mandates.

3204 NRM PLAN. The NRM plan is a five-year planning document that guides legally and ecologically sound, cost-effective management of natural resources to maximize benefits for the installation and neighboring community.

A. **Contents.** The NRM plan consists of the following four sections:

1. Land management
2. Forest management
3. Fish and wildlife management
4. Outdoor recreation resources management.

B. **Integration.** NRM plans will assist personnel who plan and implement mission activities, as well as natural resources managers. New and continuing mission activities that affect natural resources will be coordinated with appropriate Natural Resources Managers.

C. **Annual review.** All sections of NRM plan must be reviewed annually by each installation and updated as necessary. An installation may request the appropriate Engineering Field Division (EFD) to review and update sections of an installation's NRM plan. Copies of the most current NRM plan sections shall be provided to the installation by the appropriate EFD.

D. **NEPA interface.** The preparation of the NRM plan shall include an environmental review (assessment or impact statement) and an opportunity for public participation as outlined in the National Environmental Policy Act (NEPA). NEPA documentation is discussed more fully in chapter 26 of this Deskbook.

E. **Funding.** Funds for NRM may be available from a variety of sources in addition to appropriated funds, such as agricultural outlease funds, forestry programs, and the Legacy Resource Management Program. Since the management of natural resources is an inherently governmental function, DOD Directive 4100.15, "Commercial Activities Program" of March 10, 1989, does not apply to the management, implementation, planning, or enforcement of NRM Programs.

3205 SPECIFIC LAND MANAGEMENT TOPICS. As suggested above, natural resources management encompasses a vast range of subjects. Land use must comply with existing laws and regulations that enforce the preservation of natural resources. The following topics are a sampler of some of the major fields of interest.

A. **Agriculture and grazing.** As part of the integrated management of natural resources, DOD lands shall be managed to conserve lands suitable for agriculture and grazing and will be reviewed for outlease for those purposes when compatible with military needs. 10 U.S.C. § 2667 provides for the outleasing of

nonexcess public lands and for the use of the funds generated by leases to be used for the administrative costs of the leases, as well as the financing of NRM Programs.

B. **Coastal zone management.** The Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451 *et seq.*, requires federally funded actions to be preceded by a determination of consistency with a State's coastal zone management plan. It is implemented by 15 C.F.R. § 930. See also chapter 27 of this Deskbook.

C. **Conservation programs.** The Sikes Act, 16 U.S.C. §§ 670a *et seq.*; 10 U.S.C. § 2671(a), requires each military installation to manage natural resources so as to provide for multipurpose uses and to provide public access appropriate for those uses, unless access is inconsistent with the military mission. In addition, each military department must ensure professional services are provided which are necessary for management of fish and wildlife resources on each installation. See chapter 29 for a discussion of the Sikes Act.

D. **Fish and wildlife management.** The Natural Resources Manager must manage a coordinated program of actions designed to protect, enhance, and control various types of wildlife and its habitats, including conservation of protected species and non-game species, management and harvest of game species, bird aircraft strike hazard (BASH) reduction, and animal damage control. Chapters 28 and 29 of this Deskbook discuss endangered species and wildlife protection; chapters 30 and 31 review marine sanctuaries and wildlife refuges.

E. **Forest management.** The Natural Resources Manager must be familiar with timber management, forest administration, timber sales, reforestation, timber stand improvement, timber access road construction and maintenance, forest protection, and all other elements directly related to the commercial production and sale of forest products, as well as programs to maintain the health and vigor of non-commercial forest ecosystems.

F. **Historic and archeological resources.** DON must identify, protect, and promote the restoration, improvement, and proper use of historic and archeological resources on its installations in conformance with the National Historic Preservation and the Archeological Resources Protection Acts, 16 U.S.C. §§ 470 *et seq.* Chapter 33 examines historic and archeological resources management.

G. **Land management.** The Natural Resources Manager must be familiar with the management of soil conservation, erosion control, surface and subsurface waters management, land restoration, noxious weed and poisonous plants control, agricultural outleasing, range management, landscaping, wetlands identification and protection, floodplains management, and grounds maintenance.

H. ***Legacy Resource Management Program.*** DON installations are encouraged to participate fully in the DOD Legacy Resource Management Program in order to promote the conservation of biological, geophysical, cultural, and historic resources under Departmental control and to demonstrate a leadership role in protecting the environment.

I. ***NEPA.*** Proposed actions, such as acquisitions, disposals, base expansion, operational changes, etc., must be planned in accordance with NEPA regulations and procedures. Chapter 26 of this Deskbook provides more detailed guidance.

J. ***Outdoor Recreation Resources Management.*** This constitutes management of natural resources to develop opportunities for recreation, establishment and management of ecological reserves and natural research areas, hiking / interpretive trails, and other outdoor recreation assets; preservation of scenic rivers and areas with wilderness attributes; and control of off-road vehicles.

K. ***Wetlands protection.*** Federal agencies must take actions to identify and protect wetlands, minimize their destruction, and preserve and enhance the natural and beneficial values of wetlands. Chapter 13 of this Deskbook discusses DON wetlands preservation.

CHAPTER XXXIII

PROTECTION OF HISTORIC AND ARCHEOLOGICAL
RESOURCES

PART I

THE NATIONAL HISTORIC PRESERVATION ACT (NHPA)

3301 REFERENCES

- A. National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et. seq.*
- B. NHPA Regulations, 36 C.F.R. Parts 60, 65, 68, 73 & 800
- C. Executive Order 11593, "Protection and Enhancement of the Cultural Environment," (May 15, 1971)
- D. DOD Directive 4710.1, Archaeologic and Historic Resource Management
- E. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROTECTION MANUAL, Ch. 20
- F. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 19
- G. SECNAVINST 4000.35, Subj: DEPARTMENT OF THE NAVY (DON) CULTURAL RESOURCES PROGRAM

3302 OVERVIEW. In recognition of the importance of preserving historic property, Congress enacted the National Historic Preservation Act (NHPA) to establish a detailed consultative process, known as the Section 106 process. NHPA does not create any substantive rights; rather, it creates a number of affirmative Federal duties and establishes a framework for deliberative decisionmaking on projects affecting historic properties.

3303 FEDERAL DUTIES UNDER NHPA. Federal agencies responsibilities under NHPA include the duty to:

A. Preserve historic properties which are owned and controlled by the agency, consistent with the agency mission and professional standards;

B. locate, inventory and nominate historical properties that appear to qualify for inclusion in the National Register;

C. make use of available historical property before acquiring other properties;

D. make appropriate records when an historic structure is to be demolished or substantially altered;

E. consider the effect undertakings may have on property on the National Register of Historical Places (NRHP) or eligible for listing on the National Register;

F. minimize to the maximum extent possible the effect of an undertaking on a "National Landmark;" and

G. provide the Secretary of Interior the opportunity to review and approve the plans of transferees of surplus federally owned properties to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved.

3304 THE CONSULTATION REQUIREMENT. The Navy is not necessarily prohibited from changing or demolishing historic properties. Rather, NHPA establishes a consultative process involving the Navy, the Advisory Council on Historic Preservation, the State Historic Preservation Officer (SHPO), and other "interested parties" before we begin activities which affect a historic site. In some situations, for example, NHPA will be satisfied simply by making an accurate record of the historic property to be changed or destroyed, a process sometimes called "archiving."

A. **"Historic Property."** Historic property is that property which is listed, or eligible for listing, in the NRHP. The property may be real or personal, including historic homes, commercial areas, industrial complexes, ships, railroad facilities, airplanes, rock art, landscapes, World War II era structures, and places of traditional religious-cultural importance to American Indian and other ethnic groups. Generally, the property must be at least 50 years old to qualify. The Register is maintained by the National Park Service, Department of the Interior, which may be reached at (202) 343-9536.

B. **"Undertaking."** An undertaking is any project, activity, or program that can result in changes in the character or use of historic properties, if any such properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of the elements not previously considered under section 106.

C. **"Criteria of Effect."** To trigger the Section 106 process, the undertaking must have an effect on a historic property. "Effect" is a term of art; the word should not be used loosely in NHPA documents.

D. **"Programmatic Agreement (PA)."** A written agreement among the agency, the SHPO, and the Advisory Council that streamlines the Section 106 consultation. A PA stipulates how an entire program or class of undertakings, repetitive in nature or similar in effect, will be carried out to avoid or mitigate effects on historic properties.

1. Historical property is deemed affected if the undertaking may alter the characteristics that qualify it for inclusion in the National Register. Depending on the property's significant characteristics, alterations to its location, setting, or use may be relevant.

2. An undertaking is considered to have an "adverse effect" when the effect on the historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, or other factors which contribute to the property's qualification for the National Register. Adverse effects on historic properties include, but are not limited to:

- a. Physical destruction, damage, or alteration of all or part of the property;
- b. isolation of the property from its setting;
- c. introduction of visual, audible, or atmospheric elements that are out of character with the property or setting; or
- d. transfer, lease or sale of the property.

3305 THE SECTION 106 PROCESS. The Section 106 process identifies and evaluates historic properties, assesses the effects of the agency's proposed action on them, and establishes consultation on how to avoid, reduce, or mitigate identified adverse effects.

A. After the Federal agency determines that the proposed project is an undertaking, the agency, in consultation with the SHPO, makes a good faith effort to locate historic property which might be affected. It may be necessary to seek information from local governments, Indian tribes, public and private organizations that are likely to have knowledge of historic properties in the area.

1. If the SHPO and the agency agree that no historic properties are affected, the process ends. SHPO silence will constitute agreement.

2. If the SHPO and the agency agree that a property is affected, the process continues.

3. If they disagree, or if the Advisory Council on Historic Preservation (Council) requests, the Secretary of the Interior (SECINT) will decide.

B. If a property might be affected, the agency assesses the degree of effect by applying the regulatory "criteria of effect."

1. If the agency finds there will be no effect, it notifies the SHPO. If the SHPO and the Advisory Council concur, the process ends.

2. If an effect is found, or if the SHPO makes a timely objection to the "no effect finding," the agency applies regulatory "criteria of *adverse* effect."

C. The agency determines whether the effect is adverse.

1. If the agency determines the effect is not adverse, the findings are submitted to the Advisory Council; if the Council does not object within 30 days, the Section 106 process ends.

2. If the agency finds an adverse effect, or the Council registers a timely objection, the effect is presumed adverse and the process continues.

D. The agency consults with the SHPO and interested persons who are invited to participate, receive information, and express their views. Interested persons may include local government representatives, Native American tribal leaders, etc.

1. If the agency and the SHPO agree on how to address the adverse effects, they execute a Memorandum of Agreement (MOA). If the Advisory Council has not participated, they must be given an opportunity to comment. They get 30 days to decide whether to comment and 60 days to do so.

Protection of Historic and Archeological Resources

2. If the agency is considering a number of similar actions, it may be preferable to negotiate a Programmatic MOA. For example, the Navy entered into one MOA for the demolition of quonset huts at a number of installations.

3. If an MOA cannot be negotiated and further consultation will not be fruitful, the consultation ends. The agency must ask the Council to comment. The Council has 60 days to do so. The most significant disadvantage of this alternate procedure is delay. If the Council decides that the agency's documentation is incomplete, the 60-day period will begin after the supplementary information has been submitted.

E. The agency must then consider the Council's comments in reaching a final decision on the proposed undertaking. The process ends as the agency notifies the Council of its decision. The notification should occur, if practicable, before the undertaking begins.

F. If the Advisory Council decides that the agency is not consulting in good faith, it will send a "foreclosure" letter stating that the agency had not provided the Council with a reasonable opportunity to comment. Opponents of a project may seek to enjoin the project on the basis of the "foreclosure" letter.

3306 WORLD HERITAGE CONVENTION. In 1973, the Senate ratified U.S. participation in the Convention Concerning the Protection of the World Cultural and Natural Heritage. The purpose of the Convention is to enhance world-wide understanding and appreciation of heritage conservation and protect properties that have outstanding universal value to mankind. Each participating nation shall take, insofar as possible, appropriate measures to protect properties of outstanding universal value.

3307 NAVY POINT OF CONTACT. Mr. John Bernard Murphy, Naval Facilities Engineering Command (NAVFACENGCOM): (703 325-7353/7344; DSN 221-same).

PART II

THE ARCHAEOLOGICAL RESOURCE PROTECTION ACT (ARPA)

3308 REFERENCES

- A. Archeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa *et seq.*
- B. Protection of Archeological Resources: Uniform Regulations, 32 C.F.R. § 229
- C. Archeological and Historic Data Preservation Act, 16 U.S.C. §§ 469 *et seq.*
- D. Executive Order 11593, Protection and Enhancement of the Cultural Environment, 5 May 1971
- E. DOD Directive 4710.1, Archeological and Historic Resources Management
- F. DOD Directive 6050.1, Environmental Effects in the United States of DOD Actions
- G. SECNAVINST 4000.35, Subj: DON CULTURAL RESOURCES PROGRAM
- H. OPNAVINST 5090.1A, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM, Ch. 20
- I. MCO P5090.2, Subj: ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL, Ch. 19

APPENDICES

- A. American Indian Religious Freedom Act (AIRFA)
- B. Native American Graves Protection and Repatriation Act (NAGPRA)

Protection of Historic and Archeological Resources

3309 OVERVIEW. Recognizing that archaeological resources are an important part of the national heritage, Congress enacted the Archaeological Resource Protection Act (ARPA) to protect those resources found on Federal lands. To that end, ARPA prohibits the excavation, removal, damaging, alteration, or defacement of archeological resources on Federal property without a permit from the appropriate Federal land manager.

3310 ARCHAEOLOGICAL RESOURCE DEFINED. An "archaeological resource" is any material remains of human life or activities, at least 100 years old, which is of archaeological interest. Archaeological resources may include human skeletal remains, surface or subsurface structures, shipwrecks, pottery, bottles, tools, etc. The term does not, however, include coins, bullets and unworked minerals or rocks.

-- ***Indian tribe defined.*** An "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* An annual list of recognized tribes is published in the Federal Register by SECINT pursuant to 25 C.F.R. Part 83. (Native Hawaiian organizations are not "Indian tribes.")

3311 FEDERAL LAND MANAGER RESPONSIBILITIES. The Federal land manager for Navy installations is NAVFACENGCOM. The point of contact there is Mr. John Bernard Murphy. His telephone number is (703) 325-7353; DSN 221-7353/7344. Under ARPA, Federal land manager responsibilities include the duty to:

- A. Develop plans to survey lands to determine the nature and extent of archeological resources;
- B. prepare a schedule for surveying lands likely to contain the most scientifically valuable archeological resources;
- C. approve permit applications for qualified applicants meeting the regulatory criteria;
- D. identify all Indian tribes having aboriginal or historic ties to land under the manager's jurisdiction and seek to determine the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes;

E. develop documents and procedures for reporting suspected ARPA violations; and

F. establish a program to increase public awareness of the significance of archeological resources and the need to protect them.

3312 PROHIBITED ACTS. No person may excavate, remove, damage, or otherwise alter or deface any archeological resource located on public lands or Indian lands without a permit. No person may sell, purchase, exchange, transport, or receive any archeological resource that was illegally excavated or removed.

3313 THE PERMIT PROCESS. Individuals desiring to excavate archaeological resources within the scope of ARPA must submit a permit application to the agency which administers the property. Navy ARPA permits are issued by N-44E. The application shall include the information the Federal land manager deems necessary, including the time, scope, and purpose of the proposed work.

A. Excavations must be undertaken to further archeological knowledge in the public interest. Only a "qualified" individual, typically associated with a university or museum, can be granted a permit which provides for curation of the artifacts discovered. Resources which are removed remain the property of the United States. The agency may consider whether the proposed activity conflicts with existing land management plans.

B. If proposed activity of the applicant could damage any Indian religious or cultural site, as determined by the Federal land manager, notice must be given to the affected tribe at least 30 days before a permit is issued. The land manager should meet with official representatives of any tribe which considers the site as having religious or cultural importance to discuss their interests and ways to avoid or mitigate the harm or destruction. Appendices A and B to this chapter contain additional information on Native American issues in environmental law.

C. If the permit is denied, or if granted with overly restrictive conditions, the applicant may appeal through the existing administrative procedures or procedures established by the Federal land manager.

3314 FEDERAL ACTIVITIES. The Federal land manager need not issue itself a permit to conduct activities unrelated to excavation for archeological purposes. Similarly, permits are not required for archeological activities carried out at the direction of Federal land managers by persons associated with the management of

Protection of Historic and Archeological Resources

archeological resources. Although the ARPA permitting process does not apply to the Federal agency itself, the Section 106 process described under NHPA does apply.

Before a Federal agency undertakes the construction of a dam, it shall give notice to SECINT setting forth the site and the approximate area to be flooded. Whenever any Federal agency finds, or is notified in writing by an appropriate historical or archeological authority, that its activities in connection with any Federal construction project may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, the agency shall notify SECINT. If SECINT determines that significant data may be irrevocably lost, he / she may conduct a survey and recover and preserve such data which, in his / her opinion, should be preserved in the public interest. No recovery work will be required if it would impede an emergency project.

3315 ENFORCEMENT

A. **Criminal penalties.** Knowing permit violations are punishable by a \$10,000.00 fine and one year imprisonment. If the value of the removal or destruction exceeds \$500.00, however, the maximum punishment is increased to \$20,000.00 and two years. If the value exceeds \$20,000.00, the maximum punishment is \$100,000.00 and five years. In 1993, four men pled guilty to interstate trafficking in archeological resources looted from two Civil War era shipwrecks in the James River off Newport News, VA. The Union ship *USS Cumberland* and the Confederate raider *CSS Florida* are both Navy property. A man was recently convicted of plundering the Gettysburg battlefield.

B. **Civil penalties.** After giving notice and a hearing, Federal land managers may impose civil penalties for ARPA violations. The amount of the fine is related to the value of the archaeological resource removed and the cost of replacing it. The looter may also be required to forfeit any vehicles and equipment used in the act. In 1993, three men pled guilty to illegally excavating more than 250 holes and removing over 200 artifacts from the Colonial National Historical Park in Yorktown, VA. Each of the three men agreed to pay \$5,000.00 in restitution for the cost of resulting damages and archeological investigation, return the stolen artifacts, and forfeit their metal detecting equipment and a 1986 Isuzu Trooper.

C. **Prevention.** To implement ARPA locally and to avoid the adverse publicity due to an ARPA violation, installations known to have archeological resource sites should take steps to inform installation personnel and visitors of ARPA and its criminal and civil penalties for violations. Other installation personnel, particularly military police and security personnel, should be sensitive of the need to report incidents of damage, defacement, excavation, or removal of archeological resources.

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APPENDIX A

AMERICAN INDIAN RELIGIOUS FREEDOM ACT (AIRFA)

A. REFERENCE:

-- American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996

B. Federal agencies should be sensitive to the special concerns of Indian tribes in historic and cultural preservation. Essentially, AIRFA secures for Native Americans, including American Indians, Eskimo, Aleut, and Native Hawaiians, the religious freedom afforded all citizens under the First Amendment.

C. Agencies should consult Native American leaders before approving a project likely to affect religious practice and allow access to sites with religious significance on Federal land. Federal agencies must consider, but not necessarily defer to, Native American religious values.

D. AIRFA does not create a cause of action or judicially enforceable rights in favor of individual Indians. It does not prohibit agencies from adopting a land use that conflicts with traditional Native American religious beliefs or practices.

E. An agency undertaking a land use project complies with AIRFA by obtaining and considering the views of Native American leaders in the decisionmaking process, and by avoiding unnecessary interference with their religious practices during the project's implementation.

F. Leaders of Native American tribes have a role in the consultation process provided for in NHPA, ARPA and AIRFA. Tribes may participate in the environmental planning process provided for pursuant to the National Environmental Policy Act (NEPA); the NEPA process is an appropriate vehicle for consultation contemplated by these Acts. Formal NEPA procedures, however, should not displace informal planning and cooperation.

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APPENDIX B

NATIVE AMERICAN GRAVES PROTECTION
AND REPATRIATION ACT (NAGPRA)

A. REFERENCES

1. Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001 *et seq.*
2. Illegal Trafficking in Native American Human Remains and Cultural Items, 18 U.S.C. § 1170.

B. NAGPRA establishes a procedure for the return to American Indians, Native Hawaiians, and Native Alaskans certain human remains and other cultural items presently held by Federal agencies or Federally-assisted museums or other institutions.

C. NAGPRA defines "cultural items" as (a) human remains, (b) funerary objects associated with human remains and burial sites, (c) sacred religious objects, and (d) cultural patrimony, defined as material remains of "historical, traditional, or cultural importance to the Native American group or culture itself. . . ."

D. ***Treatment of pre-enactment cultural items.*** NAGPRA requires inventories of collections of Native American human remains and associated funerary object; summaries of unassociated funerary objects, sacred objects, and object of cultural patrimony; and repatriation of cultural items.

(1) ***Inventories.*** By November 1995, the Navy is required to compile and inventory, based upon available information, human remains and associated funerary objects in its possession or control and identify the geographical and cultural affiliation of such item.

(2) ***Summaries.*** By November 1993, the Navy is required to prepare summaries, based upon available information, which describe the character, cultural affiliation, extent and location of its collection of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

(3) ***Notification and Repatriation.*** Within six months after completion of the inventory, the Navy shall notify the affected Indian tribes or Native Hawaiian organizations. Upon request, the items shall be returned in accordance with the

priorities set forth in 25 U.S.C. § 3005(a)(5). In the case of competing claims, the dispute will be resolved by a court of competent jurisdiction.

E. *Treatment of post-enactment cultural items.* The Navy shall not claim ownership of cultural items which are excavated or discovered on Navy-controlled land after the enactment of the Act (1990). Ownership shall be established in accordance with the priorities set forth in 25 U.S.C. § 3002(a).

F. *Intentional excavation and removal of native american human remains and objects.* The intentional excavation and removal of covered items is only permitted if:

(1) Such items are excavated and removed pursuant to a permit issued under section 4 of the ARPA (16 U.S.C. § 470aa *et seq.*) which is consistent with this Act;

(2) such items are excavated after consultation with the appropriate Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be in accordance with the Act; and

(4) proof of consultation or consent is shown.

G. *Inadvertent discovery of remains and objects.* In the event that cultural items are inadvertently discovered on Navy-controlled land, either in the course of a Federal undertaking or other activity, the Navy must, for at least 30 days, cease or cause the cessation of the undertaking or activity, in whole or in that part effecting the cultural items discovered. Protection may be include physical barriers, security personnel, or removal by qualified personnel. The Navy shall notify the appropriate Indian tribe or Native Hawaiian organization and provide for the disposition and control of the item in accordance with the Act.

H. *Relinquishment.* The governing body of an Indian tribe or Native Hawaiian organization may expressly relinquish control over any Native American human remains, or title to or control over any funerary object, or sacred object.

I. *Penalties.* Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American or cultural items without the right of possession as provided by NAGPRA shall be fined in accordance with title 18 and imprisoned not more than one year for the first violation and not more than five years in the case of subsequent violations.

CHAPTER XXXIV**THE AIR INSTALLATIONS COMPATIBLE
USE ZONES (AICUZ) PROGRAM****3401 REFERENCES**

- A. Noise Control Act (NCA), 42 U.S.C. §§ 4901 *et seq.*
- B. DOD AICUZ Directive, 32 C.F.R. Part 256
- C. SECNAVINST 11010.11, Subj: AIR INSTALLATIONS COMPATIBLE USE ZONES (AICUZ)
- D. OPNAVINST 11010.36A, Subj: AIR INSTALLATIONS COMPATIBLE USE ZONES (AICUZ) PROGRAM
- E. Aviation Safety & Noise Abatement Act, 49 U.S.C. § 2101
- F. NAVFAC P-73, Real Estate Administration

3402 BACKGROUND. When the Department of the Navy (DON) decides that a new Naval or Marine Corps air station is needed, a suitable site is selected. Selection factors include the absence of: (1) natural hazards, (2) man-made obstructions, and (3) major population centers in the vicinity of the proposed site. As soon as the air station is built, the population begins to grow. The open, undeveloped landscape that originally made the airfield resemble a landlocked carrier begins to disappear. Development around the air station continues, commensurate with the population demand. Development may threaten air operations in several ways. First, development may create obstructions to safe flight operations. Second, development near the runways and under low level flight paths may be inappropriate in light of aircraft noise levels or the risk of aircraft accidents. To protect aviators and the public from the negative effects of incompatible development and to preserve the value of the air station for training, the Air Installations Compatible Use Zones (AICUZ) program identifies areas around the air station affected in various ways by takeoff and approach operations and recommends compatible uses of that land to civilian community planners.

3403 AICUZ CONTENTS. An AICUZ plan addresses three areas of overlapping concern: obstructions, accident risks, and noise.

A. **Obstructions.** Obstructions are natural objects, man-made structures, and activities which present safety hazards to takeoff and approach operations because they penetrate into the navigable airspace surrounding an airfield. An object may be an obstruction due to its height (e.g., a factory smokestack, a powerline, or a tall building). Other obstructions (e.g., a factory smokestack that is under the height limitations, but emits smoke that reduces visibility), send visible emissions into the operational airspace. Electronic emissions, though invisible, can be obstructions because they may interfere with the safe operation of, and communication with, military aircraft. Navy AICUZ plan recommendations to restrict obstructions are consistent with similar limitations prescribed by the Federal Aviation Administration (FAA).

B. **Accident risks.** The Department of Defense (DOD) has conducted studies to determine the likely locations of aircraft accidents in the vicinity of the runways. Most accidents occur at the ends of the runway, with the number of accidents decreasing as the distance from the airstrip increases. Consequently, three Accident Potential Zones (APZs) were administratively established to reflect this empirical data that gives planners an approximation of the percentage of accidents in a particular area, if not a true statistical probability of an accident occurring in each APZ. The statistics relate to the likely *location* of accidents, not the probability of an accident occurring.

1. For runways used by fixed wing aircraft, each of the APZs is 3,000 feet wide. The Clear Zone (CZ), measured from the end of the runway out 3,000 feet, is the area of greatest risk. Given the higher risk, most of the land within the CZ has either been purchased outright in fee or is leased by the government. All air stations operated by the Navy and the Marine Corps must have a CZ at the ends of runways. APZ I is 5,000 feet long and begins at the end of the CZ. APZ II is 7,000 feet long and begins at the end of APZ I. APZs I and II are required under flight tracks experiencing 5,000 or more annual operations (approaches or departures).

2. Studies show that accidents which occur within 10 nautical miles (nm) of the runway follow in a general pattern, for example: 28% on the runway; 29% within the CZ; 8% within APZ I; 5% within APZ II; and 30% elsewhere within the 10 nm radius. The dimensions of the APZs may be modified to reflect a runway's accident statistics that can vary with the nature of air operations and the type of aircraft. The statistics used throughout this chapter are offered solely to give the reader an understanding of the AICUZ concept. Specific information for each air installation should be obtained from local historical operations records and projected plans.

3. Risks from flight operations to off installation population areas obviously could be avoided by purchasing all the land in the APZs. At some installations the Navy has done that but that is an expensive solution warranted only in CZs. Under DOD Instruction 4165.57 Subj: AIR INSTALLATIONS COMPATIBLE USE ZONES, the policy is to acquire these areas only when our efforts to secure compatible use zoning by the local government have failed and the "operational integrity of the air installation is manifestly threatened."

C. **Noise.** Not all citizens can tolerate the "sound of freedom" from military aircraft. The noise of airfield operations to varying degrees affects the local community physiologically by creating temporary shifts in hearing thresholds and by causing sleep loss. Noise may affect behavior by interrupting human activities (e.g., work or speech). No doubt it can also cause stress.

1. The first step in defining the noise aspect of the AICUZ plan is data collection. Data is collected by the installation regarding a wide range of activities including the types of aircraft, number of flights, flight tracks, time of day, atmospheric conditions and ground operations. Experts will use these data to develop noise contours to describe the amount and location of noise surrounding an airfield. The computation is made using the Day-Night Average Sound level (Ldn; also referred to as DNL) method, a methodology recommended by the U.S. Environmental Protection Agency (EPA), which corrects for the greater impact (annoyance) of sound at night. The "correction" is a 10 decibel (dB) "penalty" added to the actual decibel level of the nighttime noise. For comparison purposes, the dB level, as perceived by the human ear, of the following sources is approximately: 20dB, a wilderness area; 40dB, a quiet residential area; 60dB, human conversation at a distance of five feet; 75dB, television audio; 80 dB, a motorcycle at 50 feet; 95dB, a power mower at operator distance; 105dB, jet flyby at 1000 feet; and 115dB, a live rock band.

2. While the Noise Control Act (NCA), 42 U.S.C. §§ 4901 *et seq.*, by its terms is inapplicable to military aircraft (42 U.S.C. § 4902(3)(B)), it directs Federal agencies to carry out their programs so as to further the Act's policy to "promote an environment for all Americans free from noise that jeopardizes their health or welfare." To preserve the notion that NCA neither creates a cause of action nor confers jurisdiction over AICUZ matters, the DOD position in litigation has been that the AICUZ program is not the product of the NCA. Rather, the AICUZ program is an illustration of DOD efforts to be consistent with the spirit of NCA and its direction to Federal agencies.

D. **The map.** The final product of the AICUZ study is the Compatible Use District (CUD) map. This map blends the restrictions for obstructions, the APZs, and the noise contours into a comprehensive "footprint" for the airfield. The CUD map is the basis of our recommendations to local government on uses of adjacent lands

which are compatible with aviation operations. These recommendations are based on two primary sources, discussed below.

1. Enclosure (4) of DOD Instruction 4165.57 assimilates DOD data on aircraft accidents. Styled "Land Use Compatibility Guidelines for Accident Potential," this enclosure categorizes possible land uses as compatible or incompatible with the CZ, APZ I, or APZ II. Generally speaking, residential development is incompatible in the CZ or APZ I; single family dwellings may be compatible in APZ II.

2. The primary source of our recommendations regarding land uses in particular noise contours is "Guidelines for Considering Noise in Land Use Planning and Control," published in the June 1980 report of the Federal Interagency Committee on Urban Noise (FICUN). This publication reflects the coordination of various federal programs to encourage noise sensitive development, away from major noise sources. EPA, DOD, Department of Transportation (DOT), Department of Housing and Urban Development (HUD), and Veterans Administration (VA) are signatories to the FICUN report. This publication lists land use compatibility guidelines for 55 through 85 Ldn sound zones. Generally, zones in excess of 65 Ldn are deemed incompatible for residential use.

3404 COOPERATION WITH LOCAL LAND PLANNERS. The AICUZ program is implemented through the local government's powers over land use, planning, zoning ordinances and building codes. The air installation gives the AICUZ study to local community planners and encourages them to incorporate the recommendations into the overall local land use planning process and into their comprehensive plan, if they have one. The publication of the AICUZ plan by itself has no legal effect but the Navy or the Marine Corps, as an interested landowner, is entitled to participate in the local zoning process and to attempt to persuade the local government to accept our recommendations. *De-Tom Enterprises, Inc. v. United States*, 552 F.2d 337 (Ct. Cl. 1977).

A. The air installation cannot go beyond mere participation in the zoning process. The air installation cannot take actions to reduce adjoining property values intentionally. *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970). The installation's actions must be reasonable and straightforward to avoid the kind of judicial criticism leveled at Marine Corps Air Station, El Toro, California, in *Rossmoor Corp. v. United States*, Ct. Cl. #396-67, 503 F.2d 1406 (Ct. Cl. 1974). In that case, the installation overstated aircraft accidents by 50%, and tried to force a landowner to grant an easement for low level overflights in exchange for rezoning that would permit construction of a retirement community. The case was ultimately settled out of court when the United States paid compensation for the easement.

B. Local communities have another subtle inducement to incorporate the AICUZ study into the local planning process. The "Guidelines for Considering Noise in Land Use Planning and Control" specify the intent of HUD and the VA to follow DOD's APZ determinations and noise contour studies. Consequently, HUD and the VA refuse to provide assistance (e.g., guaranteeing home mortgages) for construction in APZs and in areas of high noise.

3405 JUDICIAL CHALLENGE

A. ***Inverse condemnation suits.*** The direct challenges to AICUZ take the form of inverse condemnation suits brought in the U.S. Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491. (See 28 U.S.C.A. § 1491 Note 106). The plaintiff landowner argues that the federal government's actions (e.g., air operations such as low level overflights during field carrier landing practice) have so interfered with the use and enjoyment of the property that it has been "taken" for public use without just compensation guaranteed under the Fifth Amendment to the U.S. Constitution. The "condemnation" is "inverse" in that it is the indirect result of governmental action as opposed to a traditional "direct" taking of private property by condemnation or the power of eminent domain (e.g., for highway or municipal airport construction).

1. Plaintiffs may also allege a regulatory taking, arguing that the zoning restrictions implementing the AICUZ plan are so restrictive that the property owner has been denied all reasonable and beneficial use of the land. Zoning ordinances are presumed to be valid unless the plaintiff can show them to be arbitrary, unreasonable and lacking a substantial relationship to public health, safety, or welfare. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), is often cited for the proposition that if the land, after a restrictive zoning ordinance has been enacted, can be economically used for some purpose (e.g., recreation, agriculture, or grazing livestock), a "taking" will not be found. These two principles gave zoning officials a relatively free hand in regulating land use.

2. The confidence of zoning boards in the wake of *Hadacheck* was diminished by *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), where the Supreme Court ruled that if a taking has occurred, a plaintiff is entitled to damages from the date of the taking, not merely the date of the court's judgment. The Court did not amplify the definition of "taking" or develop a yardstick with which to measure damages. Prior to this case, if a taking had been found, the government could simply pay the plaintiff just compensation for the property or rescind the ordinance. The local government's potential financial liability under *First English* may make land use planners more wary. This may manifest itself as reluctance on the part of local governments to incorporate the AICUZ study

into comprehensive plans and zoning ordinances, or later deviate from it during rezoning proposals.

3. A regulatory taking presents potential liability to the local government because it exercises the police power in connection with zoning. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). The AICUZ study merely recommends compatible uses for local development. Since the AICUZ plan, standing alone, has no regulatory effect, statements of fact (APZs and noise data) and recommendations in the AICUZ plan cannot constitute a taking. Nevertheless, plaintiffs may attack the federal government for its efforts, as a landowner, to influence the zoning board. As long as there has been no overreaching or improper conduct (e.g., denying a property owner the due process of a zoning hearing by entering into an outcome influencing memorandum of understanding with the county before the hearing takes place), these plaintiffs will generally be unsuccessful. *Gilliland v. United States*, 228 Ct. Cl. 709 (1981); *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1978).

B. **Physical invasion.** Plaintiffs may argue a physical invasion theory of "taking" resulting from low-flying aircraft. The Supreme Court's "substantial interference" test of *United States v. Causby*, 328 U.S. 256 (1946) generated a spate of litigation. The "500 foot rule" emerged as the bright line standard in such cases; no taking occurred where the overflight exceeded 500 feet above ground level (AGL). *Aaron v. United States*, 311 F.2d 798, 160 Ct. Cl. 295 (1963). The sole exception to the prevailing rule concerned the field mirror landing practice (also called, field carrier landing practice (FCLP), performed at 600 feet AGL, at Marine Corps Air Station, Beaufort, South Carolina. *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981). The *Branning* case, however, subsequently has been limited to its peculiar facts. *Hero Lands Co. v. United States*, 554 F. Supp. 1262 (Ct. Cl. 1983).

1. Claims under the Tucker Act are subject to a six year statute of limitations. 28 U.S.C. § 2501. Regardless of the frequency and noise level of overflights, the property owner's claim will be barred if the overflights have not **increased** in frequency or noise level during the prior six years. Moving the flight track of these same overflights can, however, give rise to a new cause of action to affected landowners below.

2. In addition, plaintiffs may bring actions for noise and vibration damage caused by overflights. These claims are typically brought under the Military Claims Act, 10 U.S.C. § 2733, rather than under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, 2672 and 2674-2680. To prevail under the case law, which favorably views flights within navigable airspace, the plaintiff must show that the noise and the vibration cause an immediate interference with the use and enjoyment of the property and that the interference is so substantial as to amount

to a taking. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984); *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D. Utah 1986).

3406 REGIONAL ISSUES

A. *California*

1. While the publication of an AICUZ plan by itself has no legal effect, California law operates to make it very powerful because state law prohibits residential construction in areas above 65 Community Noise Equivalent (CNEL). CNEL is the California method of measuring noise. CNEL is roughly equivalent to the Day-Night Average Sound level (Ldn) methodology used by Federal agencies such as DOD.

2. In California and several other states, a plaintiff may recover damages solely for noise. Under federal law, however, noise alone is insufficient for a claim of inverse condemnation.

B. *Florida*. In the past the Navy has presented draft airport zoning ordinances to several Florida communities, including Clay, Duval, Santa Rosa, and Escambia Counties. With some modifications, the counties have enacted it. Since zoning is a delegated power, not all communities have the same zoning authority. Judge advocates (JAs) must consult the enabling legislation in each case.

C. *Hawaii*. In Hawaii, prospective home buyers must be informed that a property is located in an area of 55 Ldn or higher. Consequently, the accuracy of Navy and Marine Corps air installation AICUZ data becomes very important. Furthermore, local developers are likely to do their own sound measurements. Because of the outdoor character of life in Hawaii, local authorities use the 60 Ldn contour as a cut off for residential development. The Navy AICUZ program does not object to the imposition by local authorities of restrictions more strict than those recommended by AICUZ plans.

D. *Jurisdictions without zoning ordinances*. Not all local communities near air installations have zoning ordinances to enforce land use planning policies. Moreover, some jurisdictions have no land use plans. In some parts of the United States there is an historical resistance to restricting a landowner's right to use private property as the landowner may desire. Without zoning ordinances for enforcement, a local government's land use plan is little more than a "recommendation" to private landowners. Where there are no land use plans or zoning ordinances to enforce the planning, the air installation has a more difficult task in obtaining local cooperation with the AICUZ concept. The challenge can be met, however, by establishing an installation community relations program that has

the objective of educating the community about the negative impact of incompatible development on the future of the air installation. In this era of base realignment and closure, even local communities without zoning ordinances are more aware of the fact that air installations in some cases are the "economic engine" of the local economy. The economic impact of an air installation on the surrounding region should be emphasized to the public at every opportunity. In response to a continuing campaign of public information by the air installation, local governments may initiate a limited zoning ordinance regime designed to protect the future viability of the air installation from development encroachment.

3407 AICUZ AND THE FUTURE. While much of the work in the AICUZ program is concerned with getting the AICUZ plan adopted by the local government, the game is not over when the local land use planners incorporate the AICUZ recommendations into the comprehensive plan.

A. The AICUZ study should reflect a five year forecast of air operations activity based upon historical trends and unclassified projected aircraft base loadings and mission changes. The AICUZ plan should be updated at least once every five years or more frequently if there is a significant, permanent change (increasing or decreasing) in the operational tempo or type of aircraft used at an air installation. Changes could have a significant effect on recommended land use restrictions. DoN civilian attorneys and JAs should be mindful of AICUZ issues also during the National Environmental Policy Act (NEPA) process. When feasible, AICUZ studies should be conducted in conjunction with environmental impact statements (EISs) or environmental assessments (EAs). The EIS or EA analysis may yield innovative ways to address AICUZ issues (e.g., protecting against development encroachment in an AICUZ context by protecting wetlands or habitat for threatened or endangered species).

B. Once a local comprehensive zoning ordinance is passed, the air installation must monitor the zoning process to ensure hard fought for restrictions do not slip away. Property owners may attempt to have individual tracts rezoned to less restrictive classifications. Other landowners may seek to have property subdivided, with a view toward further development incompatible with the comprehensive plan. Comprehensive zoning may also be eroded through the granting of variances to restrictions when their application to a particular property would cause an alleged severe hardship to a landowner. Public hearings to consider variance applications and rezoning petitions are publicized in the local media but they must be monitored. If the air installation fails to object in a timely manner, these requests will probably be granted.

C. The air installation can also be proactive. The Navy has recommended that local governments adopt disclosure ordinances that require sellers to disclose the effects of aircraft noise and / or the location of the air station in deeds and sales contracts. The Navy has also recommended amendments to building codes to require sound attenuation. To that end, the Navy entered into a contract to obtain information regarding the sound attenuation properties of building materials in different regions of the country to assist local communities in enforcing sound attenuation requirements. In this regard, we must be mindful that all development restrictions reduce property values. If the AICUZ plan recommendations are unreasonable, the zoning board that adopts them may be liable for a regulatory taking and for compensatory damages. The result could be that the local zoning board and neighboring governments might be reluctant to adopt AICUZ plans recommendations.

3408 ADDITIONAL READING. For a more detailed examination of this subject, consult a scholarly article by Lieutenant Colonel Bernard K. Schafer, USAF, "*The Air Installation Compatible Use Zone Program: The Science and the Law*," 31 A.F. L. Rev. 165 (1989).

3409 POINT OF CONTACT. If you have AICUZ questions of a technical nature, contact the AICUZ Encroachment Special Assistant at Naval Facilities Engineering Command, Code 150, Planning and Engineering Division, 200 Stovall Street, Alexandria VA 22332-2300; DSN: 221-0090; commercial: (703) 325-0090.

CHAPTER XXXV

BASE CLOSURE AND REALIGNMENT

3501 REFERENCES

- A. Base Closure and Realignments, 10 U.S.C. § 2687
- B. Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526 (Oct 24, 1988), as amended, 10 U.S.C. § 2687 note
- C. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510 (Nov 5, 1990), as amended, 10 U.S.C. § 2687 note
- D. SECNAV NOTICE 11000, Subj: BASE CLOSURE AND REALIGNMENT (8 Dec 93)
- E. Department of the Navy Environmental Policy Memorandum 93-03: Subj: PROCEDURES FOR IDENTIFICATION OF UNCONTAMINATED PROPERTY AND CLEANUP OF CONTAMINATED PROPERTY AT CLOSING INSTALLATIONS

3502 BACKGROUND

A. Before 1977, opening and closing military installations were considered Executive Branch functions. Such actions were accomplished with little consideration given to congressional concerns and with only cursory notification. Many bases were closed in the early 1960s to reduce overhead; hundreds closed in the early 1970s after the end of the Vietnam War.

B. These efforts were met with considerable opposition by members of Congress who feared the economic impact on their communities. There were allegations that the Executive Branch's choice of bases was influenced by improper political considerations.

C. In 1977, Congress enacted legislation (codified at 10 U.S.C. § 2687) which required the Department of Defense (DOD) to comply with certain procedural

requirements before carrying out a major base closure or realignment. Most notably, this legislation required DOD to follow the time-consuming environmental evaluation procedures of the National Environmental Protection Act (NEPA) in order to **decide** which bases to close / realign. This requirement subjected DOD to litigation and political and community influence. Accordingly, there were no closures or realignments pursuant to the 1977 legislation. 10 U.S.C. § 2687(b).

3503 1988 BASE REALIGNMENT AND CLOSURE (BRAC)

A. With the continued decline of force structure in the post-Vietnam "peacetime" environment, by the late 1980s, base structure had become bloated throughout DOD. The military leadership had serious concerns about the ability to maintain force structure because they were being forced to retain base structure. Then-Secretary of Defense Frank Carlucci decided he must take action; with the support of pro-defense members of Congress, he convened a commission charged with recommending bases for closure and realignment based on independent evaluation of domestic military base structure.

B. In 1988, the Commission worked, with the assistance of the military services, to determine which bases should be closed or realigned, based on the current force structure and on criteria which they had determined were appropriate factors to consider in making the selections (military value, costs, savings, and impacts on communities). Congress was persuaded that this Commission was in fact independent. Legislation validating their work, allowing for congressional veto of the entire list, and containing provisions for implementing the recommendations was enacted as the Defense Authorization Amendments and Base Closure and Realignment Act (hereinafter referred to as the 1988 Base Closure Act), Pub. L. No. 100-526 (October 1988). (10 U.S.C. § 2687 note).

C. The 1988 Report of the Defense Secretary's Commission on Base Realignments and Closures affected 145 installations (including 12 Navy installations). Of this number, 86 are to be fully closed, five are to be closed in part, and 54 will experience change (either an increase or decrease), as units and activities are relocated. Under the 1988 Base Closure Act, all closures and realignments had to be initiated by September 30, 1991, and must be completed by September 30, 1995.

3504 "BRAC-91"

A. Despite the number of bases closed by the 1988 Commission, with the end of the Cold War and continued declines in both force structure and budgets, DOD realized that more base closures were needed. Then Secretary of Defense Cheney asked the military services to propose additional bases for closure and realignment

in 1990. Congress protested that the list was, again, politically motivated, and directed that it not be executed. To end the stalemate, Congress drew upon the experience of 1988 Commission and enacted the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510 in November 1990. (10 U.S.C. § 2687 note.) (Hereinafter referred to as the 1990 Base Closure Act.)

B. *The 1990 Base Closure Act*

1. **Scope:** Until December 31, 1995, with limited exceptions, the process outlined in the 1990 Base Closure Act is the exclusive authority for actions taken to effect or implement closure and realignment of bases which exceed the thresholds set forth in 10 U.S.C. §2687. Those thresholds are:

a. the closure of any military installation at which at least 300 civilian personnel are authorized to be employed;

b. any realignment involving a reduction by more than 1,000 or by more than 50 percent in the number of authorized civilian personnel at an installation authorized to employ 300 or more civilian personnel; or

c. any construction which is independent of any relocation of civilian personnel to such facility by reason of any closure or realignment which exceeds these thresholds.

All military installations inside the U.S. and its territories and possessions must be considered equally for closure or realignment. The Act does not restrict the closure or realignment of overseas installations; installations without the requisite number of civilian employees; or reductions in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.

2. **Purpose:** To provide a fair process that will result in the timely closure and realignment of military installations inside the United States. The Act provides for three rounds of base closure and realignment in 1991, 1993, and 1995.

3. **To accomplish fairness,** the Act established clear roles for various players in the process:

a. **The Secretary of Defense (SECDEF)** develops the force structure plan, develops the selection criteria, develops recommendations for closure and / or realignment, and transmits them to the Commission and Congress.

b. The **Defense Base Closure and Realignment Commission** is an independent commission appointed by the President. It reviews the SECDEF recommendations in light of the force structure plan and selection

Consolidated Environmental Law Deskbook

criteria. All Commission hearings must be open to the public. The Commission issues a report to the President analyzing the SECDEF recommendations and making its recommendations for closure / realignment.

c. The *President* appoints the Commissioners with the advice and consent of Congress. He reviews the Commission report and approves or disapproves it. If the report is approved, the President transmits the recommendations to Congress for consideration.

d. The *Congress* has oversight of the process generally and is provided with copies of the recommendations and documentation at all stages of the process. Congress has the ability to "veto" the list by means of a joint resolution disapproving the recommendations (all or nothing).

e. *The General Accounting Office* (GAO) is tasked with oversight of the process and with assisting the Commission in review and analysis of the recommendations. The GAO must transmit a report with a detailed analysis of the SECDEF recommendations and selection process to the Commission and Congress.

4. *To accomplish timeliness*, the Act set a very stringent timetable to be followed throughout the process; generally, if a "due date" is missed, the process ends (see section 3509 below for the BRAC-95 timetable).

C. The 1991 Commission recommended 34 base closures and 48 realignments (including 1 Marine Corps and 33 Navy installations). Under the 1990 Base Closure Act, these realignments and closures must have been initiated no later than two years after the date the President transmitted his report to Congress (July 15, 1993) and must be completed no later than the end of the six-year period beginning on the date on which the President transmitted the report to Congress (July 15, 1997).

3505 "BRAC-93"

A. During BRAC-91, the Department of the Navy (DON) received considerable criticism for its process from both the GAO and the Commission. The GAO reported it was unable to evaluate the DON process because there were no records of how decisions were made and no internal controls to validate the accuracy of data and information. The Commission likewise reported they were unable to review the process because of lack of records. Additionally, the DON, DOD, and the Commission were sued by Pennsylvania Senator Arlen Specter, and others. The DON recommended closure of Philadelphia Naval Shipyard in BRAC-91, and the Commission concurred with that recommendation. The suit claimed the process

under the Act was not followed, information was withheld from the commission, and that "hearings" were held outside of the public process. [Note: The case went to the Supreme Court on writ of certiorari; oral arguments were heard on March 2, 1994 and the decision was issued May 23, 1994 (Dalton v. Specter, No. 93-289, 1994 WL 197061 (U.S. May 23, 1994)). The Supreme Court held that judicial review was not available for respondent's claims. This decision is significant since, if Specter had prevailed, it would have opened up the whole statutory base closure process to court suits.]

B. In part because of the "Navy experience," and in part because Congress wished to be more involved, Pub. L. No. 101-510 was amended by Pub. L. No. 102-190 (Fiscal Year (FY) 1992 DOD Authorization Bill), which contained the following significant provisions affecting the base closure and realignment process:

1. Explicitly provided that *all* information used by DOD to prepare recommendations would be provided to the Commission, the GAO, and Congress.
2. Required persons submitting information to SECDEF and the Commission to certify that information is accurate and complete to the best of that person's knowledge and belief.
3. Clarified procedures to be followed for the Commission to make changes to SECDEF recommendations (especially public notification in advance of a proposed change).
4. Changed the due date for the GAO report from May 15th to April 15th (so the commission could rely on the GAO report in doing its review).

C. The 1993 Commission recommended 130 base closures and 45 realignments (including 91 Navy and Marine Corps installations). Under the 1990 Base Closure Act, these realignments and closures must be initiated no later than two years after the date the President transmitted his report to Congress (July 1, 1995) and must be completed no later than the end of the six-year period beginning on the date on which the President transmitted the report to Congress (July 1, 1999).

3506 "BRAC-95"

A. *Base Closure Act amendment.* The FY-94 DOD Authorization Act (Pub. L. No. 103-160) contained three fairly minor provisions which will affect the process for 1995:

1. Due date for SECDEF recommendations to the Commission changed from March 15th to March 1st.

2. Commission must now give 45-days' notice (vice 30 days) of proposed changes to the SECDEF list.

3. Testimony before the Commission must now be under oath.

B. **Force structure plan.** Pursuant to the 1990 Base Closure Act, the DOD base structure must be reviewed in light of the force structure plan for 2001, reflected in the FY-96 budget justification documents submitted to Congress.

C. **Selection criteria.** The 1990 Base Closure Act requires DOD to publish the selection criteria that the military departments will use in making their closure and realignment recommendations to SECDEF. The same eight selection criteria were used in the 1991 and 1993 rounds of base closure and realignment, and SECDEF recently determined that they will also be used in the 1995 round.

1. **Military value:** The first four criteria are given priority, so as to allow the military departments to evaluate activities based on current and future defense requirements.

a. The current and future mission requirements and the impact on operational readiness of the DODs total force.

b. The availability and condition of land, facilities, and associated airspace at both the existing and potential receiving locations.

c. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

d. The cost and manpower implications.

2. **Return on investment:** The fifth criteria uses an Office of the Secretary of Defense (OSD) required tool — Cost of Base Realignment Actions (COBRA). This tool estimates return on investment (20 Year Net Present Value and number of years required for savings to offset costs) and one-time / recurring costs/savings associated with the closure or realignment of a military installation.

-- The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

3. **Impacts:** The last three criteria address the impacts on the communities at both the closing and receiving sites:

a. The economic impact on surrounding communities;

- b. the ability of both the existing and potential receiving communities' infrastructure to support forces, missions, and personnel; and
- c. the environmental impact.

3507 DEPARTMENT OF THE NAVY BRAC-95 PROCESS

A. **DON guidance.** SECNAV NOTICE 11000 (dated 8 December 1993) established the procedures for the DON to support the DOD implementation of the Base Closure Act of 1990. Similar to the mechanism used for BRAC-93, the following two base closure-unique groups were established:

1. The **Base Structure Evaluation Committee (BSEC)** is composed of the Assistant Secretary of the Navy (Installations and Environment) as Chair, the Executive Director of the Base Structure Analysis Team (BSAT) as Vice Chair, two Navy Flag officers, two Marine Corps General officers, and two individuals of Flag, General officer, or Senior Executive Service rank (one recommended by the Assistant Secretary of the Navy (Research, Development and Acquisition) and one recommended by the Assistant Secretary of the Navy (Installations and Environment)). The BSEC is responsible for:

- a. Conducting analyses and developing recommendations for closure and realignment of DON military installations for approval by SECNAV.
- b. Ensuring a fair and complete evaluation of all Navy and Marine Corps installations is conducted in accordance with the Act.
- c. Ensuring that operational factors of concern to the operational Commanders in Chief are considered.
- d. Ensuring that the process utilized, the conduct of the deliberations, and the preparation of the report containing the recommendations are timely, thorough, and in compliance with the Act, guidance from SECDEF, and the Notice.
- e. Providing base closure and realignment recommendations to the Under Secretary of the Navy for review in December 1994.

2. **The BSAT**, under the direction, guidance, and oversight of the BSEC, includes analysts and supporting staff from throughout the DON and from the Center for Naval Analyses. The BSAT is responsible for:

- a. Responding to the guidance and direction of the BSEC.

b. Developing analytical methodologies and techniques for consideration by the BSEC.

c. Controlling the development of the Base Structure Data Base and the associated documentation.

d. Protecting the integrity of the process by ensuring that all data, considerations, and evaluations are treated as sensitive and internal to the process.

B. ***Installation categorization.*** BRAC-95 will review approximately 1,000 Navy and Marine Corps activities. These activities have been divided into categories based on the activity's primary function and mission. Within each of the five categories, there are a number of subcategories that further identify the universe for analytical purposes. All activities within these categories / subcategories will be analyzed using the selection criteria published by DOD. Data calls to categories of installations will be formulated by the BSAT, and approved by the BSEC, with input from technical experts and review of draft data calls by the installation commanders before final data calls are issued. The data call responses from the activities, with review and certification at each level in the chain of command, will be used to conduct the analysis and evaluation of all installations.

C. ***Capacity analysis.*** Subcategories of activities will be analyzed to determine if excess capacity exists. If no excess capacity exists, analysis stops and that subcategory of activities will only be evaluated as a "follower" activity, (e.g., BRAC-93 evaluated medical / dental activities as followers and only those medical/dental activities that were supporting a closing base were considered for closure).

D. ***Military value analysis.*** In all subcategories where it is determined that excess capacity exists, a military value analysis is performed using the certified data from the data call responses and the DOD selection criteria, and each activity in that subcategory is given a military value.

E. ***Configuration analysis.*** Configuration analysis is also performed on each subcategory of activities where excess capacity exists, after the military value analysis is completed. Given a set of "rules" or parameters, each subcategory of activities is analyzed with a view to minimizing excess capacity in that particular subcategory while maintaining at least the same average military value that currently exists in that subcategory.

F. ***Scenario development.*** Using the analyses described above, the BSEC determines various options for closures and realignments. Additional data is then

collected from the field in order to review these various closure and realignment alternatives.

G. ***Return on investment and impact analyses.*** These alternatives for closure and realignment are then evaluated in terms of return on investment (i.e. cost of closure versus savings gained by closure), the economic impact on the community where the closing base is located, the impact on the community where the realignment will occur (i.e. can the infrastructure of that community support the influx of personnel and new military missions), and the environmental impact on the surrounding communities where the closure and / or realignment occur.

H. ***Final report.*** The BSEC makes its recommendations to SECNAV and, in turn, SECNAV publishes his recommendations to SECDEF.

I. ***OSD issues.*** OSD issued its BRAC-95 policy on January 7, 1994, and established six Joint Cross-Service Groups in the areas with significant potential for cross-service impacts in BRAC-95.

1. The six areas are depot maintenance, laboratories, undergraduate pilot training, test and evaluation, military treatment facilities, and economic impact.

2. The purpose of the five functional area joint cross-service groups is:

a. To determine the common support functions and bases to be addressed by each joint group;

b. to establish the guidelines, standards, assumptions, measures of merit, data elements and milestone schedules for DOD Component conduct of cross-service analyses of common support functions;

c. to oversee DOD Component cross-service analyses of these common support functions;

d. to identify necessary outsourcing policies and make recommendations regarding these policies;

e. to review excess capacity analyses;

f. to develop closure or realignment alternatives and numerical excess capacity reduction targets for consideration in such analyses; and

g. to analyze cross-service tradeoffs.

3508 CERTIFICATION

A. Section 2903(c)(5) of the Base Closure Act of 1990 requires information submitted to the SECDEF or the Commission to be certified as accurate and complete to the best of the submitter's knowledge and belief by the Secretaries of the military departments, the heads of defense agencies, and each person who is in a position, the duties of which include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations.

B. SECNAVNOTE 11000 (of December 8, 1993) contains the DON BRAC-95 certification policy and procedure to comply with this provision. In short, every officer or employee of the DON, uniformed or civilian, who provides information for use in the BRAC-95 process shall be required to provide therewith a signed certification. The information will be certified at the point of origin (normally the individual activity), and at each point through the chain of command to the BSAT. Absent this chain of certification, no information provided for use in the BRAC-95 process shall become part of the Base Structure Data Base or be relied upon by the BSEC for analysis or evaluation.

3509 MILESTONES

15 Dec 94	Final force structure plan submitted to Congress with FY-96 Budget
3 Jan 95	President must transmit Commission nominations to Congress
1 Mar 95	Date SECDEF recommendations due to Commission
15 Apr 95	GAO report analyzing SECDEF recommendations and selection process due to Commission and Congress
16 May 95	Commission proposed changes to SECDEF recommendations must be published in Federal Register
1 Jul 95	Commission report due to President
15 Jul 95	President approves or disapproves Commission recommendations (if disapproved, sent back to Commission)
1 Sep 95	Last date President may forward approved recommendations to Congress

3509 IMPLEMENTATION OF PRIOR ROUNDS OF BASE CLOSURE

A. ***Force and effect of recommendations.*** Almost all BRAC-related implementation questions can be answered by the application of either or both of two "rules":

1. In consonance with the DOD view, the recommendations contained in the Commission report, when not disapproved by Congress, have the force and effect of law. Accordingly, the terms of such recommendations must be implemented literally, and any flexibility in implementation must be derived from the language of the recommendations themselves.

2. Whenever such a recommendation provides options (e.g., multiple receiving sites), as a matter of policy, resort should be made to the appropriate DON BRAC records (e.g., DONs *Analyses and Recommendations March 1993* (Navy Report), which is volume IV to the DOD Base Closure and Realignment Report to the Commission) to determine whether SECNAV has taken a position regarding how such a recommendation should be implemented. As a matter of policy and consistency of position, to the extent a recommendation is proposed to be implemented in a manner substantively different from this earlier position, the Secretary should be afforded the opportunity to determine whether the earlier position nonetheless should be effected.

B. ***President Clinton's five-point plan.*** On July 2, 1993, President Clinton announced *A Program to Revitalize Base Closure Communities* (called the five-part plan) to speed the economic recovery of communities where military bases are slated to close. The five parts of the community reinvestment program are:

1. Jobs-centered property disposal that puts local economic redevelopment first.

2. Easy access to transition and redevelopment help for workers and communities.

3. Fast-track cleanup that removes needless delays while protecting human health and the environment.

4. Transition coordinators at major bases slated for closure.

5. Larger economic development planning grants to base closure communities.

Many of the provisions implementing this plan are found in the amendments to the 1988 and 1990 Base Closure Acts contained in the FY-94 DOD Authorization Act (Pub. L. No. 103-160, the "Pryor Amendment"). The Pryor Amendment seeks to

encourage economic development in areas affected by base closures by expediting disposal of property to community redevelopment authorities. DOD regulations implementing the Pryor Amendment have been published for comment (Revitalizing Base Closure Communities and Community Assistance, 59 Fed.Reg. 16123 (1994) (to be codified at 32 C.F.R. pts. 90 and 91) (proposed Apr. 6, 1994)).

C. ***Disposal of property.*** The authority to transfer and dispose of excess and surplus properties has been delegated from General Services Administration (GSA) to SECDEF by section 2905(b) of the 1990 Base Closure Act. The Secretary shall exercise that authority in accordance with the regulations governing the utilization of excess property and the disposal of surplus property (41 C.F.R. 101 Part 47). Because the Pryor Amendment affects the disposal of real and personal property, this area of the law is in a state of change. The following are some of the key elements related to base closure property screening and disposal.

1. ***Transfer within DOD.*** The Secretary may transfer property located on a military installation to be closed or realigned to a military department or other entity within DOD or the Coast Guard, with or without reimbursement [Pub. L. No. 101-510, § 2905(b)(2)(D)]. The Pryor Amendment (Pub. L. No. 103-160, § 2904) provides that determination of whether another department or agency of the Federal Government wishes or will accept such transfer must be made not later than six months after the date of approval of closure of an installation.

2. ***Utilization of excess property.*** Before disposing of government property, the DON must satisfy itself that it is not needed by other government agencies. The property is "screened" by sending a notice of availability to Federal real property holding agencies. If a request for transfer is received, the Department must determine that the transfer is in the best interest of the government and that the requesting agency is the appropriate agency to hold the property. Again, the Pryor Amendment has set a time limit on such screening of six months from the date of approval of closure.

3. ***Stewart B. McKinney Act (42 U.S.C. §§ 11301 et seq).*** The Pryor Amendment (Pub. L. No. 103-160 § 2905) made some changes to the timetable and procedures for screening property for the homeless. Except as expressly amended by Pryor, the provisions of 42 U.S.C. § 11411 apply. For BRAC properties, the property is first screened for use by Federal agencies. If an agency does not request the property, the military department must hold an outreach workshop for homeless providers and report the property to the Department of Housing and Urban Development (HUD). Notice of availability is published once in the Federal Register and, if a homeless provider does not make a timely application, the redevelopment authority may express an interest in using the property for economic development.

4. **Redevelopment authorities.** The Pryor Amendment specifically authorizes the transfer of real or personal property located at a closing installation to the redevelopment authority for economic development for less than fair market value or without consideration (Pub. L. No. 103-160, § 2903). "Redevelopment authority" is defined as "any entity (including an entity established by a State or Local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation and for directing the implementation of such plan" (Pub.L.No. 103-160, § 2918(a)(3)). After screening real property for use by other Federal agencies or the homeless, surplus property "shall be available only for the purpose of permitting the redevelopment authority to express in writing an interest in the use of the property" for economic development (Pub. L. No. 103-160, § 2905). If the redevelopment authority does not express an interest in the use of the property, the property must be reported again for use by the homeless. If the homeless do not acquire the property, the normal property disposal procedures of 41 C.F.R. 101, Subpart 47, apply.

5. **Personal property.** The Pryor Amendment (Pub. L. No. 103-160, § 2902) requires the military departments and defense agencies to take an inventory of all personal property at closing bases to identify personal property that will complement the real property to be conveyed to the local redevelopment authority for supporting the economic development of the base. The inventory must be done in consultation with local redevelopment authority officials. Personal property may not be removed from the base until certain milestones have been reached, to give the community ample opportunity to determine whether it wishes to obtain the personal property, unless the personal property falls into specified mission-essential exceptions.

6. **Indian tribes.** Governments of Indian tribes shall be treated as state and local governments for the purposes of disposition of real property recommended for closure (FY-94 DOD Appropriations Act, Pub. L. No. 103-139, § 8013). This places Indian tribes in the same "special" status as state and local governments with regard to disposal of real property. In general, to be "treated as state and local governments" means that an entity may acquire surplus property for less than fair-market value for specifically enumerated purposes—such as education, public health, parks, airports, economic development. Further, the property may be acquired for any purpose by negotiation rather than by sealed bids.

7. **Public benefit uses.** Surplus property may also be made available for public benefit uses, generally at less than fair-market value. Notices of availability are sent to the agencies which sponsor public benefit disposals to public agencies, as follows:

Education

Property for educational purposes [40 U.S.C.
§ 484(k)(1)(A)]

Health and Human Services	Property for public health purposes [40 U.S.C. § 484(k)(1)(B)]
Interior	Property for public park and recreation areas [40 U.S.C. § 484(k)(2)]; historic monuments [40 U.S.C. § 484(k)(3)]; wildlife conservation areas [16 U.S.C. § 667b-d]
FAA	Property for airport purposes [50 U.S.C. App. § 1622(g)]
Attorney General	Property for correctional facilities [40 U.S.C. § 484(p)(1)]
Transportation	Property for port facilities [40 U.S.C. § 484(q)]

D. **Cleanup of base closure properties.** Environmental contamination on military bases is extensive and requires a major effort to clean up. Federal and state environmental laws and regulations govern cleanup, but generally do not integrate cleanup into the base reuse process.

1. One part of the President's five-part plan is the creation of a fast-track cleanup program, which ensures that information concerning the nature and extent of contamination is made available to the community reuse effort as early as possible to ensure that the planning process takes into account the existing conditions at the installation. The Community Environmental Response Facilitation Action (CERFA) (Pub. L. No. 102-426) (Oct. 19, 1992) amended section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9620(h)), and requires the identification and documentation of all uncontaminated real property at DOD installations undergoing closure or realignment and subsequent disposal. In accordance with those laws, OSD has issued guidance and policy to conduct environmental cleanup actions and programs to protect human health and the environment and to facilitate the reuse and redevelopment of closure bases as expeditiously as possible. The policy establishes procedures and responsibilities for:

- a. Establishing base realignment and closure cleanup teams at closing bases;
- b. accelerating the NEPA analysis process for base disposal decisions;
- c. improving public involvement in environmental cleanup at closing bases;

d. reaching a finding of suitability to lease (FOSL) for real property at closing bases; and

e. identifying and documenting uncontaminated property at closing bases in compliance with CERFA.

2. The Pryor Amendment translated some of these policies into law. Identification of uncontaminated property must occur within nine months of the submittal of a specific use proposal for all or part of the real property of the closing installation (Pub. L. No. 103-160, § 2910). Any environmental impact analyses required with respect to the installation and the redevelopment plan shall, to the extent practicable, be completed within twelve months of the submittal of a redevelopment plan (Pub. L. No. 103-160, § 2911). That amendment also requires a transition coordinator to be designated for each military installation to be closed, who is responsible for coordinating all cleanup and property disposal actions between the installation and the local redevelopment authority.

3. Pub. L. No. 103-160, § 2908, authorizes SECDEF to enter into agreements to transfer by deed real property or facilities at closing installations to a person who agrees to perform all required environmental cleanup, waste management, and environmental compliance activities. The Secretary must determine that the costs of all environmental cleanup activities to be paid by the recipient of the property are equal to or greater than the fair-market value of the property to be transferred, or, if the costs are lower, the recipient must agree to pay the difference. As part of such agreement, the Secretary must disclose any information regarding the environmental condition of the facilities.

3510 BASE CLOSURE AND REALIGNMENT LEGAL RESOURCES

The General Counsel of the Department of the Navy is responsible for determining whether the legal requirements of the Act and other statutes and regulations affecting closures and realignments under the 1988, 1991, and 1993 rounds of closures and realignments, and under the forthcoming 1995 round, are being met by the Department. Within OGC, the Office of the Assistant General Counsel (Installations & Environment) has been tasked with satisfying this responsibility. Issues should be raised to that office via Command Counsel or the appropriate Regional Environmental Counsel.

CHAPTER XXXVI

ENVIRONMENTAL PROTECTION OVERSEAS

3601 REFERENCES

- A. Executive Order No. 12114, Environmental Effects Abroad of Major Federal Actions (Jan 4, 1979)
- B. Executive Order No. 12088, Federal Compliance with Pollution Control Standards (Oct. 13, 1978)
- C. DOD Directive 6050.16, Subj: DOD POLICY FOR ESTABLISHING AND IMPLEMENTING ENVIRONMENT STANDARDS AT OVERSEAS INSTALLATIONS
- D. DOD Directive 6050.7, Subj: ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS, 32 C.F.R. Part 187.

3602 SCOPE. This chapter describes sources of legal requirements for overseas environmental protection. It explains the interplay of treaties, status of forces agreements (SOFAs), host nation law, U.S. domestic, law and various implementing instructions and directives. It also describes the Department of Defense (DOD) and Department of the Navy (DON) organization for environmental protection overseas and certain specific problems that arise in the environmental context overseas. Environmental protection overseas is one of the most dynamic areas of environmental law as this deskbook goes to press. Major policy issues are under review or in litigation and could reverse course by the time this book is published. Counsel must stay alert for developments in this area.

3603 BACKGROUND. Outside the United States, commanders face a different set of challenges in protecting the environment. Environmental standards are more difficult to define, technical assistance is more difficult or impossible to find, and funding is harder to obtain. Studies of the handling of hazardous waste at overseas installations have criticized DOD and the services for failure to define

standards and ensure adequate oversight. *See generally* General Accounting Office (GAO), *Management Problems Continue at Overseas Military Bases* (August 28, 1991). Failure to ascertain standards and ensure environmental protection can lead to more scrutiny. Although sovereign immunity under international law provides protection against enforcement of other countries' standards against U.S. military organizations, failure to meet host nation standards can lead to requests that the United States withdraw its forces. Effective environmental protection is vital because of the potential impacts that environmental failure can have on military access to installations and training sites in foreign countries and on the effect it can have on U.S. foreign policy. The freedom from the oversight of a regulatory agency like the Environmental Protection Agency (EPA) provides both the promise of more efficient environmental protection and the risk of more intrusive oversight in the future if the services cannot regulate themselves.

3604 ENVIRONMENTAL ORGANIZATION OVERSEAS. In addition to dealing with a unique set of environmental standards, commanders overseas must also work within an organizational structure that differs from that found in the United States.

A. As in CONUS, the military services are primarily responsible for ensuring that their forces are adequately equipped, trained, and funded. This includes responsibility for environmental compliance. Unlike CONUS installations, however, overseas units and installations report to a unified commander who is directly responsible to the Secretary of Defense (SECDEF) for the conduct of military operations within his area of responsibility. *See* 10 U.S.C. § 163(b). With very limited exceptions, all military units within a Commander in Chief's (CINCs) area of responsibility (AOR) report to him / her. *See* 10 U.S.C. § 162(a)(4). Because of the serious problems that failure to act responsibly towards the environment can have on the ability of the CINC to carry out his / her mission, DOD directives are assigning the CINC an increasingly important role in environmental compliance.

B. Overseas, the need to ensure cooperation among services and defense agencies is even more crucial than in CONUS. To assist the CINC and to provide host nations with a central point of contact, the CINCs have nominated, and DOD has appointed, "environmental executive agents" for each country where the United States has substantial installations. Although the executive agents were nominated and appointed under DOD Directive (DODDIR) 50.16, which only deals with environmental compliance on an installation basis, they are playing an active role in other environmental areas — including environmental restoration. Where military services have been appointed as environmental agents, the supplemental guidance issued by DOD that accompanied the directive states that the department should delegate the responsibility down to the appropriate overseas major command or activity adequate to implement the directive. *See* Supplementary Guidance to DOD

Environmental Protection Overseas

Policy for Establishing and Implementing Environmental Standards at Overseas Installations, attachment (2) to Colin McMillan memorandum of October 25, 1991. Note as well that, where a CINC or subunified commander has retained the executive agent designation, an appropriately staffed service component is frequently tasked to carry out most of the actual work subject to final approval by the CINC. A summary of current assignments of executive agents is provided in the following table.

Consolidated Environmental Law Deskbook

COUNTRY	EXECUTIVE AGENT
EUROPEAN COMMAND	
United Kingdom	CINCUSAFE
Germany	CINCAREUR
Italy	CINCUSNAVEUR
Spain	CINCUSNAVEUR
Greece	CINCUSNAVEUR
Belgium	CINCAREUR
Netherlands	CINCAREUR
Turkey	CINCUSAFE
CENTRAL COMMAND	
(All countries in AOR, including Egypt and Bahrain)	CINCCENT
ATLANTIC COMMAND	
Greenland	USAF Space Command
Iceland	CINCLANTFLT
Bermuda	CINCLANTFLT
Caribbean (including Cuba)	CINCLANTFLT
All other Atlantic locations	CINCLANTFLT
Azores	USAF Air Mobility Command
Ascension Islands	USAF Space Command
SOUTHCOM	
Panama and all countries in SOUTHCOM	CINCARSO
PACIFIC COMMAND	
Japan	CINCUSFORJAPAN
Korea	CINCUSFORKOREA
Diego Garcia	CINCPACFLT

3605 EXTRATERRITORIAL APPLICATION OF U.S. LAW. One of the greatest difficulties in environmental compliance overseas is finding applicable standards. United States domestic law rarely provides assistance.

A. **General.** On the practical side, domestic U.S. laws often are not well suited to "translation" and application overseas because they depend on U.S. political institutions and values. Foreign governments and societies may not be structured to accommodate the curious mix of federalism, strict judicial review, and public participation that characterize U.S. environmental law. See generally chapter 2, *supra*. Without similar governmental, cultural, and economic values, application of U.S. laws can produce significant diplomatic problems. Congress and the regulatory agencies simply do not consider all the foreign implications when they draft most U.S. environmental laws, and application of U.S. laws overseas can raise serious disputes over sovereignty.

B. Some domestic laws undoubtedly were intended by Congress to apply outside the United States because it is apparent from the nature of the law that limiting them to strictly territorial jurisdiction would seriously impair their usefulness. See *United States v. Bowman*, 260 U.S. 94, 98 (1922); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977). Based on this reasoning, many of the laws implementing treaties that apply outside the United States have extraterritorial effect. See paragraphs 3606.B.2, 3606.B.2(b), and 3606.B.3, *infra*.

C. The Supreme Court has recognized these practical difficulties and has repeatedly said that there is a strong presumption against the extraterritorial application of domestic civil laws where it is not clear from the nature of the law that extraterritorial application is intended. The seminal case is *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), where the Court held that Federal labor laws on overtime did not apply to American citizens employed by American companies but working in Iran and Iraq. The Court applied a canon of construction that said domestic laws only apply to conduct occurring in the United States unless Congress clearly indicates otherwise. *Id.* The Court justified the presumption on its view that Congress is primarily concerned with domestic matters.

D. The Court reexamined the *Foley* doctrine in 1991 in the context of deciding whether a naturalized U.S. citizen working for a U.S. company in Saudi Arabia could use Title VII of the 1964 Civil Rights Act to contest being fired on account of his race, religion, and national origin. The Court in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), found plausible explanations from both parties as to whether the text of the statute and its legislative history showed the intent of Congress one way or the other. After discussing the respective arguments, the Court observed: "Our conclusion today is buttressed by the fact that 'when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.'" 499 U.S. at 258, citing *Argentine Republic v. Amerada Hess Shipping Corp.*,

488 U.S. 428, 440 (1989). After citing a number of examples of statutes that explicitly extend coverage to the high seas, the Court concluded that plaintiff had not carried its burden of showing that Congress intended Title VII to apply overseas. 499 U.S. at 259.

E. ***Challenges to the presumption against extraterritoriality.*** There have been several recent attempts to apply domestic U.S. environmental laws overseas. Foremost of these is a recent decision of the Court of Appeals for the District of Columbia that caused reevaluation of how the presumption against extraterritoriality is applied to procedural laws like the National Environmental Policy Act (NEPA). The question of whether NEPA is to be applied to impacts outside the United States has been the source of several early decisions, Executive Order 12114 and a new policy review, discussed *infra* at para. 3609.B.

-- In *EDF, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993), the court faced a challenge to a proposal by the National Science Foundation to build an incinerator for food wastes at its research station in Antarctica. The court held that NEPA ***did apply*** to actions causing impacts in Antarctica because it determined that the presumption against extraterritoriality did not apply. First, the court reasoned that all the regulated conduct (i.e. the decisionmaking) was conducted in the United States where it was fully subject to NEPA. *Massey* at 533. Second, the court reasoned that the presumption did not apply in an area like Antarctica which, because it is outside the territorial jurisdiction of any other country, offered no problems because of difficulties enforcing substantive standards in a foreign country and no problems with conflict of laws. *Massey* at 534. (**Note:** Unfortunately, for Navy interests, it likened Antarctica to outer space or the high seas. See *Massey* at 534.) Bolstering this argument, the court found that Antarctica is not a "foreign country" and that the United States has significant legislative control over activities in Antarctica because of its control over air transportation and search and rescue. The court did hold out the possibility that, in other cases, the requirement to prepare an environmental impact statement (EIS) could be excused if the harm to foreign policy interests outweighed the benefits of NEPA compliance. *Massey* at 535. Having refused to apply the presumption, the court found that the broad language of NEPA argued against strictly domestic application. *Massey* at 536. The case was not appealed, but the Administration issued a statement that the result was viewed as being restricted to a unique set of facts. The ensuing reexamination of Executive Order 12114 is set out in paragraph 3609.B.

F. Since the *Massey* decision, two Supreme Court cases have undermined its rationale. First, in *Smith v. United States*, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993), the Court reversed the D.C. Circuit, holding that the Federal Tort Claims Act (FTCA) does not apply to actions arising in Antarctica. The Court held that Antarctica was a "foreign country" for purposes of the FTCA. 122 L.Ed.2d at 554. Brushing aside the absence of another competing legal regime in Antarctica, the

Court held that the presumption applies even where there could be no conflict with foreign law. 122 L.Ed.2d at 556. Second, in *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993), the Court held that section 243 of the Immigration and Nationality Act of 1952 did not apply to the Coast Guard's interception operations on the high seas. The result was to let stand Executive Order 12807, 57 Fed. Reg. 21,133 (1992), which allowed the Coast Guard to return individuals fleeing Haiti without the formal proceedings that would have been required by the statute, so long as they were seized outside U.S. territorial waters. The Court reaffirmed the presumption against extraterritoriality despite the fact that there could be no conflict with foreign law, concluding that the *Foley* presumption had a broader foundation than the mere desire to avoid conflict with the laws of another nation. The result is also surprising because the Immigration and Nationality Act of 1952 implements Article 33 of the United Nations Protocol Relating to the Status of Refugees (July 28, 1951), 19 U.S.T. 6259, T.I.A.S. No. 6577. The Court noted that the presumption has "special force" where the statute affects the Presidential role in military or foreign affairs. See 125 L.Ed.2d at 155.

-- The one district court case to consider the issue since *Massey* held that NEPA did not apply to the decision to homeport a carrier in Japan, relying on the presumption as set out in *Foley Bros., Inc. v. Filardo* and *EEOC v. Arabian Am. Oil Co.*, and questioning the vitality of *Massey* when applied to actions in a foreign country. See *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 466-67 n.3 (D.D.C. 1993). The court held that the *Foley* presumption applied with special force because of potential impacts on the security relationship between the United States and another sovereign, but refused to address other contexts. *NEPA Coalition* at 468. The court also noted that, even if NEPA did apply, the risks to U.S. foreign policy outweighed the benefits of preparing an EIS so that none would be required even under the reasoning of *Massey*. *NEPA Coalition* at 467.

G. ***Extraterritorial application of other environmental statutes.*** The Navy position is that, by their terms and subject to only limited exceptions, the Clean Air Act (CAA), Clear Water Act (CWA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and Resource Conservation and Recovery Act (RCRA) do not apply outside the United States.

1. The CAA does include provisions for dealing with air pollution associated with energy production on the outer continental shelf. See 42 U.S.C. § 7627. Attempts to apply state or Federal authority to air pollution sources beyond the territorial sea against U.S. citizens and vessels are clearly permissible, but it is unclear whether Congress intended any effort broader than that provided in section 7627. Such attempts must be analyzed on a case-by-case basis. Applying similar restrictions to foreign vessels *may* be permissible under international law, but must be limited in the means chosen and cannot hamper the right of innocent passage. See United Nations Convention on the Law of the Sea (UNCLOS) Arts.

21.1(f), 21.2, 39.2(b), 56(b), 211, 212. Where valid restrictions apply, they cannot be enforced against foreign sovereign immune vessels although many navies, including the United States, instruct their vessels to respect coastal state regulations. The International Maritime Organization (IMO) is currently drafting Annex VI to the International Maritime Convention on the Prevention of the Pollution from Ships (MARPOL) 73/78 to deal with air pollution from ships. A draft annex is expected within the next year.

2. The CWA is basically restricted to the territorial sea (generally, waters within three nautical miles of shore), but can regulate sources of pollutants that discharge to the ocean outside this area. *See generally* 33 U.S.C. § 1251(a) (purpose is to restore integrity of the nation's waters); 33 U.S.C. § 1251(c) (President to insure other countries eliminate pollution in their waters and international waters); 33 U.S.C. §§ 1362(7)-(12) (defining "discharge of a pollutant" to include only non-vessel discharges outside the territorial sea). The CWA also addresses transboundary water pollution, allowing limited reciprocal enforcement. *See* 33 U.S.C. § 1320.

3. CERCLA applies to releases within the exclusive economic zone (EEZ). *See* 42 U.S.C. § 9601(8) (defining "environment" to include U.S. land, air, and water and ocean waters for which the United States has exclusive management of fisheries).

4. Although RCRA requires certain actions of those importing hazardous waste into the United States [*see* 40 C.F.R. § 262.20] and to those exporting hazardous waste from the United States [*see* 42 U.S.C. § 6938], these apply only to conduct within the United States. The rest of its regulatory regime does not apply extraterritorially because its legislative history and statutory provisions show it was meant to solve problems in the United States — not foreign countries. *See Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 673 (S.D.N.Y. 1991) (English corporation could not sue an American company for potential leakage of hazardous waste).

5. The Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* applies, at least in part, to actions within the United States and on the high seas, but does not extend to actions in foreign countries. The statute includes a clear prohibition on taking an endangered species on the high seas. *See* 16 U.S.C. § 1538(a)(1)(C). "High seas" is defined as everything "seaward of the territorial sea of the United States except, waters officially recognized by the United States as the territorial sea of another country, under international law." *See* 50 C.F.R. § 17.21(c)(1). The scope of the requirement for consultation under 16 U.S.C. § 1536, on the other hand, is defined in regulations that have been the source of considerable controversy. Before 1986, the regulations included language that would have imposed an obligation for agencies to consult even for actions within foreign countries. The regulations were

changed in 1986 to limit the duty to actions in the United States or on the high seas. See 51 Fed. Reg. 19,926 (1986), *codified at* 50 C.F.R. § 402.01 (1993). The change in scope was challenged by environmental groups who obtained an order that the Secretary of the Interior (SECINT) revoke the offending section and propose new, broader language. See *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990). The Supreme Court reversed on the grounds that petitioners lacked standing. See *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). As a result, the regulations retain their narrower scope, but the issue of extraterritoriality remains unresolved.

3606 TREATIES AND INTERNATIONAL AGREEMENTS. An increasing number of treaties deal with environmental protection. Treaties can affect military installations or operations directly, as implemented by U.S. legislation or as incorporated in DOD standards. Many international environmental treaties deal with macro-level issues, drive high-level policy decisions, but do not impact at the installation or unit level in other than a very attenuated fashion. See, e.g., United Nations Framework Convention on Climate Change, 31 I.L.M. 851 (1992). Some international agreements can be important to the Navy even though the United States has not signed them if they are recognized by the United States as restating customary international law.

A. *Status of forces agreements (SOFAs).* DOD actions overseas often are governed by a special kind of international agreement known as a SOFA. The United States has negotiated a SOFA in virtually every country where we have an installation or operate frequently. See, e.g., Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 11 U.S.T. 1652 (1960) (Japanese SOFA); Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 4 U.S.T. 1792, T.I.A.S. 2846 (June 19, 1951) (North Atlantic Treaty Organization (NATO) SOFA). SOFAs include a basic agreement, often common to an alliance such as NATO, and a number of supplemental agreements that deal with specific countries or specific issues in countries (portions of these supplemental agreements may be classified, making research a challenge for counsel).

1. Most existing SOFAs were negotiated shortly after World War II—long before the onset of modern environmental awareness. As a result, they rarely deal specifically with environmental issues. Instead, environmental issues may be dealt with through provisions dealing with claims, residual value, customs, health, and safety. Many SOFAs also establish procedures that require decisions on base improvements and operations to be negotiated by representatives of both the United States and the host nation. SOFAs or supplemental agreements negotiated since 1990 are likely to contain specific environmental provisions.

2. SOFAs also can prescribe the effect of national laws. For example, the NATO SOFA requires that the sending state "respect" the host nation's laws, including those dealing with environmental protection. While the United States maintains that this means something less than unquestioning compliance, other nations believe otherwise. Close consultation with counsel representing the Sending State Office or other counsel tasked with working with the host nation is required.

B. **Maritime treaties.** Until very recently, most specialized environmental treaties affecting the military overseas were maritime treaties. These treaties are especially important to counsel advising afloat units.

1. ***United Nations Convention on the Law of the Sea***

-- Although the United States is not yet a party to the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (UNCLOS), it does recognize portions of it (i.e. all but Part XI which deals with deep seabed mining) as restating customary international law. See "United States Oceans Policy," Statement of the President, 19 Weekly Comp. Pres. Doc. 383 (March 10, 1983). UNCLOS has a number of provisions that deal with environmental protection and which are relevant to resolving environmental issues. Article 1, for example, defines "dumping" and "pollution of the marine environment." Article 21 sets out the competence of coastal states to regulate innocent passage for environmental protection. Article 39 establishes duties for ships and aircraft in transit passage of straits, including an obligation to comply with generally accepted international regulations, precautions, and practices to prevent pollution. Article 42 sets out the corresponding right of states bordering straits with respect to control of pollution. Article 56 sets out the right of a coastal state to prevent pollution within its EEZ. Part XII of the Convention is devoted to protection of the environment. Within that part, Article 211 addresses pollution from vessels at length. To the extent these various principles reflect customary international law, they are binding on the United States. Articles 32 and 236 deal with sovereign immunity of warships and public vessels, making them of special interest.

2. ***The International Convention on Prevention of Pollution from Ships, 1973***

a. This treaty deals with discharge of oil, noxious substances, sewage, and solid waste incidental with the operation of a ship. See S. Treaty Doc. No. 3, 100th Cong., 1st Sess. (1987), 12 I.L.M. 1319, Art. 2. The annexes to the treaty prohibit some discharges altogether (plastics), restrict other discharges to specific limits (15 ppm oil in bilgewater in port), or restrict some discharges to particular distances from land. Article 3 of the Convention recognizes the special nature of warships by exempting them from strict compliance with the provisions of the Convention. It provides that the Convention: "[S]hall not apply to any warship,

naval auxiliary or other ship . . . Each Party shall ensure by the adoption of measures not impairing the operational capabilities of such ships . . . that such ships act in a manner consistent, so far as is reasonable and practicable."

b. In addition to the general provisions, the Convention deals with particular types of discharges in five annexes. Of these, the most important for the Navy are Annex I (Oil pollution) and Annex V (Solid waste). The 1973 Convention was amended by the MARPOL Protocol in 1978. See 17 I.L.M. 546 (1978). The combination is frequently referred to as MARPOL 73/78. MARPOL 73/78 was implemented for the United States in the Act to Prevent Pollution from Ships, 33 U.S.C. § 1901 *et seq.*, which is dealt with at length in Chapter 22. Annex V was implemented by the Marine Plastic Pollution Research and Control Act, Pub. L. No. 100-220, 101 Stat. 1460 (1987), *codified at* 33 U.S.C. § 1901 *et seq.*, and section 1003 of the DOD Authorization Act of 1993, Pub. L. No. 103-160, 107 Stat. 1745 (1993). Implementation of MARPOL 73/78 generally preserves the sovereign immunity of warships and public vessels, excluding them from strict application of the standards but requiring the Secretary of the Navy (SECNAV) to prescribe regulations ensuring "so far as is reasonable and practicable without impairing the operations or operational capabilities" of the ships that they act "in a manner consistent with the MARPOL Protocol." See 33 U.S.C. §§ 1902(b) and (d).

c. MARPOL 73/78 provides additional protection to particular bodies of water which, because their oceanographic characteristics and ecological significance, requires protective measures more strict than other areas of the ocean. These are known as "special areas." Special areas are designated pursuant to provisions in MARPOL 73/78. The locations that are designated as "special areas" differ from annex-to-annex. See Tables 36-1 and 36-2 below. Most recently, the Gulf of Mexico was added as a special area under Annex V. Compliance with the additional measures in a special area is not required until the special area goes into effect. A special area goes "into effect" when the IMO determines that the littoral nations have established adequate reception facilities to service ships in the special area.

TABLE 36-1, MARPOL ANNEX I SPECIAL AREAS

Area	In Effect
Baltic Sea	yes
Black Sea	yes
Red Sea	yes
" Gulfs area" (Persian Gulf)	yes
Mediterranean	yes
Gulf of Aden	yes
Antarctic	no

TABLE 36-2, MARPOL ANNEX V SPECIAL AREAS

Area	In Effect
Antarctica	no
Black Sea	no
Baltic	yes
North Sea	yes
Red Sea	no
"Gulfs area" (Persian Gulf)	no
Gulf of Mexico	no
Mediterranean	no

3. *London Convention*

a. The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter ("London Convention"), 26 U.S.T. 2403, T.I.A.S. No. 8165, 1046 U.N.T.S. 120 (1972), restricts the disposal into the ocean from ships or aircraft of material loaded and taken to sea for the purpose of disposal. The interface of the London Convention and MARPOL 73/78 is quite precise; each is defined fairly broadly, but excludes anything regulated by the other. *Compare* MARPOL 73/78 Art. 2(3)(b) ("discharge" does not include dumping within meaning of London Convention) *with* London Convention

Art. Art. (3)(b)(i) ("dumping" does not include disposal of wastes incidental to normal operation of vessels or aircraft).

b. The London Convention also contains a provision protecting sovereign immune vessels and aircraft. Article VII of the Convention provides:

"This Convention shall not apply to those vessels and aircraft entitled to sovereign immunity . . . However each party shall ensure by the adoption of appropriate measures that such that such vessels and aircraft . . . act in a manner consistent with the object and purpose of the Convention"

-- The London Convention is implemented in the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401 *et seq.*, which applies to U.S. agencies without exception for warships or public vessels. See 33 U.S.C. § 1411 (a)(2) (no "person" can transport material to dump it) and 33 U.S.C. § 1402(e) ("person" includes officers, agents, employees and departments of the Federal government). As discussed below, this statute applies extraterritorially.

C. **Planning treaties.** Other treaties that protect environmental values require parties to include consideration of particular values in their planning processes. These impact DOD actions overseas on a far more general level than the maritime treaties, but must be considered in developing large scale plans and can influence development of rules of engagement.

1. **World Heritage Convention.**

a. The United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, TIAS No. 8226 (World Heritage Convention), is designed to protect a broad range of objects and sites important to the cultural and natural heritage of man. The United States has been a party since 1973, and the Convention has been in effect since 1975. Man made objects, including monuments, paintings, cave dwellings, buildings, groups of buildings (and many others) are considered part of the cultural heritage if they are "of outstanding universal value" from the point of view of history, art or science. See Article 1, 27 U.S.T. at 40. Combined works of nature and man can also be designated. Natural features, including geological formations, biological formations or groups of such formations, can be part of the "natural heritage" if they are of "outstanding universal value" from the point of science, conservation or natural beauty. See Article 2, 27 U.S.T. at 41. At present there are 276 cultural sites, 87 natural sites and 15 mixed sites in 86 nations.

b. Parties are required to protect and conserve the cultural and natural heritage on their territory. States are required to submit an inventory of properties forming the cultural and natural heritage which is then included on the "World Heritage List." Parties are required to assist one another with this duty and are forbidden from taking "any deliberate measures which might damage directly or indirectly the cultural and natural heritage located in their own territory or the territory of another member state." See Art. 2.3, 27 U.S.T. at 42.

c. The United States has implemented the World Heritage Convention through part of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* In particular, the Secretary of the Interior is tasked with directing and coordinating United States participation in the Convention. See 16 U.S.C. § 470a-1. Of particular concern to overseas commands, section 470a-2 expressly requires the heads of Federal agencies to take into consideration the effect of the action on a property on the World Heritage List or another country's equivalent to the National Register of Historic Places (NRHP) (see Chapter 33 for a discussion of the NRHP). Implementing regulations are found at 36 C.F.R. Part 73. The National Park Service administers compliance for the Secretary of the Interior.

2. *Convention on Analysis of Transboundary Impacts.*

a. The United States has signed the Convention on Environmental Impact Assessment in a Transboundary Context, 1991, (Transboundary Convention) 30 I.L.M. 800 (1991) but it is not yet a party. Canada and over 25 European countries have signed it, but relatively few nations have ratified it. Once 16 nations have ratified it, this convention will require the parties to provide neighboring party states (those adjacent) with the opportunity to participate in the environmental analysis for particular actions likely to cause "significant adverse transboundary impact." See Transboundary Convention, art. 2. The activities include those involving nuclear fuels and nuclear wastes, construction of airports, toxic and hazardous waste disposal, and storage of large volumes of petroleum.

b. The Transboundary Convention will require notice to the public in neighboring countries that could be affected, an opportunity for review and comment on an environmental assessment and consultation if concerns are raised. The environmental assessment, any comments submitted, and the consultations must be considered before a final decision. Although there is no general military exemption, Article 5 allows information to be protected based on national security interests.

c. The President's Council on Environmental Quality (CEQ) and EPA have been working on draft regulations, but little progress has been made to date. Some aspects of the Transboundary Convention could influence other

international agreements or the debate over Executive Order 12114. See paragraph 3609.

D. **Land-based treaties.** There are relatively few international environmental treaties that have a direct, substantial impact on installations and facilities ashore, but this is changing rapidly.

1. **European Union.** The growth of environmental regulations in the European Union (EU) (formerly the European Community (EC)) has the potential for great impacts, but most of the effects are indirect because the United States is not a party. The impacts could be felt through the action (or lack of action) of members of the EU itself as they implement the agreements. See generally, T. Smith and R. Hunter, *The European Community Envtl. Legal Sys.*, 22 E.L.R. 10106 (1992).

2. **Basel Convention.** The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649, reprinted in 57 Fed. Reg. 20606 (1992) (Basel Convention), reflects emerging international concern that developed countries are avoiding the high cost of proper treatment and disposal of hazardous and certain other wastes by shipping them to undeveloped countries for disposal under conditions that are uncertain at best. The Basel Convention was negotiated by 116 countries under the United Nations (U.N.) auspices from 1988 to 1989. The United States signed the Basel Convention on March 21, 1990, and the Senate provided its consent on August 11, 1992, but as yet the United States has not deposited any instruments of ratification because it lacks the domestic legislation necessary to implement it. In the meantime, the Basel Convention came into force May 5, 1992. A number of nations hosting U.S. installations or operations are now parties to the Basel Convention, including the United Kingdom, Italy, Spain, Portugal, Japan, Saudi Arabia, and Panama. Additional European nations are expected to ratify soon.

a. The Basel Convention is designed to encourage countries to develop their own capacity to store, treat and dispose of hazardous and "other wastes" in such a way that human health and the environment will be protected from adverse effects. It also aims to reduce the transboundary movement of hazardous wastes. Understanding the Basel Convention requires understanding several concepts including how they have or are being defined and how they have been interpreted. These include what waste is covered, when it is covered, and the procedures for and restraints on covered movements of covered wastes.

b. **Covered materials.** First and foremost, materials have to be "wastes" to be covered. Wastes are items that are disposed of, intended to be disposed of, or are required to be disposed of under national law. See Basel Convention, Article 2.1. Under Article 1, wastes can fall under the Convention in several ways:

(1) If the waste is classified as hazardous by the laws of the country of export, import or transit, it is covered. This will resolve most Basel characterization problems for Navy operators because the large number of RCRA hazardous wastes will include most eligible wastes. Where a waste is not covered by RCRA, however, care must be taken to consult the host country's lists of wastes.

(2) The waste can also be classified as hazardous under the Basel Convention's own determination scheme. The Basel Convention includes two annexes describing wastes and a third describing hazardous properties. Annex I is a typical list of waste streams producing hazardous chemicals generally recognized as potentially harmful (for example, Waste Stream Y10 includes substances and articles contaminated with polychlorinated biphenyls (PCBs) and wastes containing specific contaminants recognized as hazardous (for example, Waste 24 includes arsenic compounds). *See generally*, Basel Convention, Annex I. Wastes falling under Annex I are covered *unless* they do not exhibit any of the 14 hazardous properties in Annex III (explosive, flammable, corrosive, toxic, etc.).

(3) Annex II describes "*other wastes*" that require special handling because they could be harmful and include wastes collected from households and residues from incineration of such wastes. "Other wastes" is a term of art and describes additional material that is subject to regulation under Basel.

(4) Note that wastes derived from the normal operations of a ship and which are covered by another international instrument are excluded. *See* Basel Convention, Article 1.4. This excludes wastes covered by MARPOL 73/78, discussed *supra* at para. 3606.B.2. Likewise, waste that would otherwise be covered, but which is subject to other international regulation because it is radioactive, is not covered. *See* Basel Convention, Article 1.3.

c. **Transboundary movements.** The key to understanding "transboundary movement" is to remember that it must involve areas under the "regulatory and administrative control" of *two* states. Any movement from an area under the regulatory and administrative control of one state that either passes through another state or ends up in another state is a transboundary movement. *See* Basel Convention, Article 2.3. A movement of waste from a state to sea and then back to the same state is not a transboundary movement because only one state is involved. A similar movement through the territory of a second country is a transboundary movement. Several points are especially important for the Navy.

(1) The Basel Convention does not abridge traditional navigational freedoms:

Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with

international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.

See Basel Convention, Article 4.12.

(2) Although not expressly set out in the Basel Convention, customary international law prevents application of the Convention to sovereign immune ships and aircraft. The United States will clarify this point by inserting an "understanding" in its instrument of ratification. The clarification will also acknowledge that countries must ensure that their sovereign immune ships and aircraft act in a manner consistent with the Convention so far as is reasonable and practicable without impairing their operations or operational capability. See Message from the President Transmitting the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Treaty Doc. 102-5, 102d Cong., 1st Sess., vi (1991).

(3) Movement of waste generated on a ship while at sea and then offloaded ashore is not a transboundary movement because a ship is not "land, marine area or airspace within which a State exercises administrative and regulatory responsibility" See Basel Convention, Article 2.9.

(4) As explained in the President's transmission of the Basel Convention to the Senate, retrograde of waste either created or consolidated ashore at an overseas installation and then returned to the United States or to a third country is a transboundary movement that would be subject to the Basel Convention unless covered by an Article 11 agreement or arrangement. See Message from the President Transmitting the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Treaty Doc. 102-5, 102d Cong., 1st Sess., ix (1991). Of course a ship that *onloads* waste from one State and carries it to another State also makes a transboundary movement.

d. *Environmentally sound management.* The Basel Convention is concerned with environmentally sound management of covered wastes, which is defined as:

[T]aking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.

See Basel Convention, Article 2.8. The specific measures that constitute environmentally sound management are being defined by the parties through technical discussions and will be approved by a conference of the parties. The measures and techniques so approved are likely to define international standards that will have impact beyond the Basel Convention. Parties are required to manage hazardous and other wastes in an environmentally sound manner.

e. **Limits on transboundary movements.** The Basel Convention contains a number of requirements for parties, including assuring waste minimization, Basel Convention, Article 4.2(a), development of treatment and disposal capacities, Basel Convention, Article 4.2(b), and responsibility for recovering shipments that are refused, Basel Convention, Article 8. The requirements that are of greatest concern to most installation and operational commanders deal with restrictions on transboundary movements.

(1) Parties cannot export to or import from non-parties, see Basel Convention, Article 4.5, unless the movement is covered by a separate bilateral or multilateral agreement or arrangement. See Basel Convention, Article 11 (discussed *infra* at para. 3606.D.2. Exports to countries that prohibit imports of hazardous waste are not permitted.

(2) Parties cannot export to a party if they have reason to believe that the wastes in question will not be managed in an environmentally sound manner. See Basel Convention, Article 4.2(e).

(3) Exports must be properly packaged according to international standards, manifested and handled only by authorized individuals. See Basel Convention, Article 7.

(4) Movements are subject to a notice and consent regime that includes shipment-by-shipment consent for some substances and multi-shipment consent for other substances. This includes consent of the importing States and any transit States. See Basel Convention, Articles 4.1(c) and 6. Note that it is the understanding of the United States that a state is a "transit state" only if wastes are moved, or are planned to be moved, through that state's inland waterways, inland waters, or land territory. Movement through the territorial sea does not qualify. See Message from the President Transmitting the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Treaty Doc. 102-5, 102d Cong., 1st Sess., vi. (1991).

f. **Bilateral, multilateral and regional agreements.** The prohibitions on movements in Articles 4 and 5 of the Basel Convention do not apply to movements that are covered by other international agreements or arrangements.

(1) **Qualified treaties.** Qualified treaties in existence as of the date the Basel Convention went into force, May 5, 1992, are sufficient for transboundary movements "which take place entirely among the Parties to such agreements." See Basel Convention, Article 11.2. Such treaties are qualified if they are compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention. *Id.* For treaties negotiated *after* May 5, 1992, the agreements or arrangements cannot derogate from the environmentally sound management of Basel wastes. See Basel Convention, Article 11.1.

(2) **SOFAs.** SOFAs and the arrangements established by them for the management of overseas installations and operations were the subject of specific mention when the Basel Convention was transmitted to the Senate. That document acknowledged that the United States relies on military base agreements for management of military operations at overseas installations under which waste could be returned to the United States for environmentally sound disposal. It concluded that such agreements and arrangements were compatible with environmentally sound management and thus qualified under Article 11. Accordingly, movements of wastes among the parties to the agreement and the Basel Convention does not apply to them. See Message from the President Transmitting the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Treaty Doc. 102-5, 102d Cong., 1st Sess., iv. (1991). Future agreements and arrangements will have to meet the stricter standard under Article 11(1).

E. **Implementing legislation.** The Basel Convention will have no direct effect on DON until Congress passes and the President signs implementing legislation that will allow final ratification. Until then, the only issues that arise are those raised by countries that are already parties and which are examining their obligations vis-a-vis the United States as a non-party. Several attempts to pass implementing legislation have failed for a variety of reasons. A new effort was launched in Spring, 1994. Counsel must be alert to further developments, especially because it appears that the implementing legislation will impose restrictions that are more restrictive than the Basel Convention itself.

3607 STANDARDS FOR ENVIRONMENTAL PROTECTION AT INSTALLATIONS.

A. **Application of host nation laws.** Host nation laws impact overseas installations in three ways. First, DON installations in a foreign country have to comply with host nation laws to the extent set out in the SOFA, as discussed *infra* at para. 3606.A. Second, host nation laws are considered under DODDIR 6050.16, as discussed *infra* at para. 3607.D. Third, since 1978 agencies constructing and

operating installations outside the United States have been responsible for complying with some host nation laws.

B. Executive Order 12088. Article 1-801, Executive Order 12088, 3 C.F.R. 1978 Comp. 243 (1978), *reprinted in* 42 U.S.C.A. § 4321 note, established compliance with "environmental pollution control laws of general applicability" as a basic policy for Federal agencies. This basically adopted the same standard previously issued by the Deputy Secretary of Defense (DEPSECDEF), which explained that "environmental pollution standards of general applicability" means, unless modified by the SOFA, the "applicable pollution control standards in effect and enforced pursuant to the national pollution control laws of the host country." Laws of local governmental units are not included unless they implement national laws. Under DOD guidance, the pollution control standards must also be "substantive." The DOD guidance was apparently based on Executive Order 11752, 3 C.F.R. 1975 Comp. 829 (1973), which was subsequently revoked by Executive Order 12088. Executive Order 11752 emphasized that Federal agencies were only subject to substantive, not procedural, requirements. Domestically, this policy was upheld by the Supreme Court in *Hancock v. Train*, 426 U.S. 167, 179 (1976) (under the CAA, Congress had waived sovereign immunity as to substantive requirements, but not procedural requirements), but legislatively overruled. *See generally*, Chapter 2. Executive Order 12088 is silent on the substantive versus procedural issue, but the DOD policy has not been changed. *See* DEPSECDEF Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff and Directors of Defense Agencies, "Clarification of DOD Environmental Policy Concerning Installations Located in Foreign Countries," June 24, 1977.

C. **Other policy guidance.** OPNAVINST 5090.1A specifically addresses some aspects of environmental policy previously found only in a memorandum from DEPSECDEF in the June 24, 1977, document, *supra*. Paragraph 1-5.18 provides guidance on such matters as funding improvements at overseas facilities, site inspections by foreign inspectors, and pollution control standards for mobile sources. With respect to mobile sources, DOD policy is that they will be designed to comply with applicable U.S. standards and that they will be operated in accordance with the SOFA. If there is no SOFA, they will be operated consistent with the substantive pollution control standards observed by the host nation's military. The requirements for transient mobile sources are contained in the visit clearance.

D. **Integrated standards for compliance.** Most of the sources of environmental standards discussed above have been available since the late 1970s. Despite this, commanders have had a difficult time locating applicable environmental standards. The lack of readily apparent standards has also made it more difficult for overseas commanders to plan and budget for sustainable compliance. After several years in the drafting stage, DODDIR 6050.16, "DOD Policy for Establishing and Implementing Environmental Standards at Overseas Installations," September 20,

1991, was issued to address these shortcomings. DODDIR 6050.16 establishes a process for establishing a uniform, comprehensive set of standards to protect the environment within a specific nation.

1. **Scope.** There are several important limitations on the scope of DODDIR 6050.16:

a. DODDIR 6050.16 is concerned with protecting human health and the environment at overseas DOD *installations and facilities*. It does not address the operations of U.S. Navy vessels or U.S. military aircraft, which conform to the standards discussed above and other DOD policies, nor does it deal with exercises and training off a DOD installation. *See generally*, para. 3610, *infra*.

b. DODDIR 6050.16 does not address facilities and activities covered by Executive Order 12344, which deals with the Naval Nuclear Propulsion Program, and which are covered by 42 U.S.C. § 7158.

c. DODDIR 6050.16 does not address cleanup of environmental contamination caused by DOD's past activities. (There necessarily is discussion of cleanup of *current* spills in the Overseas Environmental Baseline Guidance Document (OEBGD) chapter on spill plans.) The policy for environmental restoration is still under development. *See generally*, para. 3608, *infra*.

d. DODDIR 6050.16 does not alter the requirements for environmental analysis despite the fact that Chapter 17 of the OEBGD restates Executive Order 12114 and DODDIR 6050.7. As set out in the scope for Chapter 17, the requirements found there were restated without substantive change in the OEBGD only to provide a more complete reference source. DODDIR 6050.16 does not change any directive or policy set out in any other DOD directive or instruction unless they are expressly mentioned. DODDIR 6050.7 is not mentioned.

2. ***Establishing comprehensive standards.*** DODDIR 6050.16 integrates the various sources of legal requirements, recognizing as it must that DOD cannot revise treaties, applicable statutes or executive orders. Executive agents, discussed *supra* in para. 3604.B, play a key role under DODDIR 6050.16 because they are responsible to the CINC for the integration process, working with all the legal sources already discussed and a recent development named the Overseas Environmental Baseline Guidance Document (OEBGD).

3. ***Overseas Environmental Baseline Guidance Document OEBGD.*** The OEBGD serves to anchor the standards for overseas environmental compliance. Produced by an interservice task force, it was first issued September 1, 1992, and will be updated periodically. The OEBGD is designed to include specific objective criteria and management practices to protect the environment. It was

developed after consideration of "generally accepted environmental standards for similar installations in the United States and requirements of U.S. law that have extraterritorial application." See DODDIR 6050.16, para. C.1.a. The OEBGD did not simply adopt U.S. law and does not automatically change when domestic law changes. (The Air Force is responsible for periodically updating the OEBGD.) Domestic law often includes requirements or utilizes institutions that are not feasible or available overseas. For example, many EPA testing protocols are not available overseas and samples cannot realistically be returned to the United States for testing. Where dealing with protecting an ambient environment (general air or water quality, for example), domestic law also depends on consideration of the receiving body and local conditions and produces "customized" regulations in the form of a permit. Thus for many environmental issues, there simply is no uniform national standard that applies to most bases. Although as described below, the OEBGD describes a "floor" below which compliance standards will not go, it is by no means the bare minimum. It is fully protective of human health and the environment. It was not designed to serve as a comprehensive set of standards in and of itself to be used by working level personnel. As discussed *infra*, it was designed to guide executive agents in the preparation of more detailed Final Governing Standards (FGS). The FGS themselves may be further supplemented by service directives.

4. **Final Governing Standards (FGS).** To produce the FGS themselves, the executive agent (EA) for a host nation is required to compare the criteria in the OEBDG with other sources of requirements. The EA will utilize the OEBGD to set the FGS if host nation standards are not applicable or less protective of the environment, unless such a result would be inconsistent with applicable host nation law (see para. 3607.B, *supra*), SOFAs or other international agreements or practices established by such agreements (see para. 3606.A.6, *supra*). The result is that the OEBGD is used unless an applicable host nation law or an applicable treaty is more protective, in which case it will be used to set the FGS. The EA issues the FGS after consultation with the CINC, U.S. diplomatic mission and in-country representatives of the service components and defense agencies. See DODDIR 6050.16, para. C.2.b. The FGS for a country constitute an independent determination under authority of DOD of standards for DOD installations. They are not subject to "approval" by the host nation, nor should they incorporate by reference either U.S. or host nation laws. See generally, OEBGD at pp. 1-4. Other **DOD** Directives may, however, be so incorporated. The FGS does not automatically change even if the underlying statute or standard on which they are based changes. Instead, changes may be incorporated during the EA's annual review of the FGS. See OEBGD at pp. 1-4, 1-5.

5. **Compliance with FGS.** Once the EA issues the FGS, the service components and defense agencies within the host nation must comply with them unless they either appeal the FGS or obtain a waiver. See DODDIR 6050.16, para. C.3.

a. When a component disagrees with a FGS, it may seek resolution of the disagreement with the CINC through the EA. See Supplementary Guidance to DOD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, attachment (2) to Colin McMillan memorandum of 25 October, 1991, p.2; OEBGD at pp. 1-4. If the service component still objects, its environmental policy principal (assistant secretary or deputy assistant secretary) may refer the matter to the Deputy Under SECDEF (Environmental Security).

b. Installations may request waivers "[I]f compliance with those standards at particular installations or facilities would seriously impair their operations, adversely affect relations with the host nation, or require substantial expenditure of funds not available for such a purpose." See DODDIR 6050.16, para. D.2.a.; OEBGD at pp.1-8. Waivers are normally requested from the EA, who consults with the CINC. Special procedures are requested for waivers of standards based on host nation law. The EA cannot grant waivers of standards based on treaties obligations. See OEBGD at pp. 1-8. It was anticipated that waivers would be sparingly granted. Lack of money or simply being out of compliance was not anticipated to be adequate reason for a waiver, even if obtaining funding or getting into compliance takes a substantial period of time (Indeed liberal waivers may make it impossible to obtain funds because the installation is then in technical compliance). Waivers are considered appropriate in a situation where compliance is impossible as a practical matter. For example, a base identified for closure could obtain a waiver of a standard that would require construction of substantial facilities that would not be ready until closure was imminent. See also SECDEF Washington DC 142159Z DEC 93, "DOD Policy and Procedures for the Realignment of Overseas Sites," which limits what can be spent on a base identified for closure.

6. *Compliance in nations without significant DOD installations.* DODDIR 6050.16 establishes an integrated process for determining environmental standards, but that process is not inexpensive. As described, the process depends on the designated executive agent to develop country specific standards. EAs have only been designated, however, where the DOD presence is significant enough to warrant the resources required. DOD has determined that where no EA has been designated, the appropriate CINC is "responsible for overseeing appropriate compliance with Executive Order 12088 or the Baseline Guidance Document." See Memorandum of the Assistant SECDEF, "Department of Defense (DOD) Executive Agents for Environmental Matters at Overseas Installations." July 7, 1992. Because compliance with an existing SOFA and Executive Order 12088 is mandatory anyway, the result is that, subject to specific provisions in the SOFA, installations and facilities in a nation without an executive agent must compare host nation pollution control laws of general applicability and the OEBGD and comply with the most protective standard.

3608 ENVIRONMENTAL RESTORATION. DOD has been pursuing a comprehensive policy for restoration of environmentally-contaminated sites overseas since 1990 with little success. As noted *supra*, at para. 3607.B, Executive Order 12088 appears to be restricted to "pollution control" laws. Initiatives led by the Air Force and then by the Joint Staff have failed to achieve consensus. Development of a new policy has been complicated by concern over vast new drains on resources and allocation of authority between unified commanders, military services and the Office of the Secretary of Defense (OSD). Efforts to draft a comprehensive policy continue, so counsel must be alert to new developments.

A. **Closing or realigning bases.** SECDEF has established policy for closing bases overseas by message. See SECDEF Washington DC 142159Z DEC 94, "DOD Policy and Procedures for the Realignment of Overseas Sites." The policy establishes a two-tiered program that depends on risk to determine timing and funding. Major commands are responsible for eliminating known imminent and substantial dangers to human health and safety. The determination of whether particular contamination poses an imminent and substantial danger is made by the installation commander after consultation with appropriate medical authorities and the designated environmental EA for the country concerned (discussed *supra* at para. 3604.B). For other contaminated sites where the risk is less severe, commanders are to document the site and provide the information to host nation officials upon return from the site. The cost of restoring the site may be included in the host nation's damage claim if permitted by SOFA. With permission of SECDEF, the host nation may remediate the site at its own cost as compensation in kind for residual value of improvements at the closing base. In practice, the cost of remediation caused by the United States will be included along with a myriad of issues raised by base closure or realignment.

B. **Active bases.** As discussed above, there is no DOD policy for remediation of active bases. Supplemental agreements to the SOFA may establish a remediation policy or remediation may be handled through a mutual base operations committee (discussed *supra*, at para. 3606.A.1).

3609 EXTRATERRITORIAL ENVIRONMENTAL ANALYSIS. The question of what environmental analysis must be done and how it must be documented before undertaking actions that could cause environmental impacts outside the United States is currently a very controversial area. The controversy involves whether NEPA should be applied extraterritorially or whether Executive Order 12114 adequately ensures environmentally informed decisions overseas. The extraterritorial application of NEPA was raised in some early cases, but subsided after President Carter issued Executive Order 12114, 3 C.F.R. 1979 Comp. 356 (1979), *reprinted at* 42 U.S.C.A. § 4321 note. The issues resurfaced in the context of large scale aid projects and loans by the World Bank with U.S. involvement that were

felt by environmental groups to ignore the environmental consequences and to hasten deforestation and decertification. As discussed *supra*, at para. 3605.E.1, the current state of the law is that NEPA does not apply to actions outside the United States which have impacts solely outside the United States, with the exception of Antarctica.

A. **Executive Order 12114.** Executive Order 12114 is based on considerations that are similar to NEPA in some respects but which also emphasize foreign policy and national defense considerations. See Executive Order 12114, at para. 1-1. The foreign policy considerations arise from sovereignty concerns of foreign governments which by international law are responsible for allocating and protecting their own natural resources and which, if recognized by the United States, are acknowledged as the legitimate representative of host populations. Imposing the same procedures used by the United States under NEPA on actions in a foreign country, where there may be broad cultural differences on how information is disseminated, judicial review, etc., could produce international tensions that make the President's foreign policy more difficult to carry out and which could limit DOD access to foreign territory.

1. Executive Order 12114 is implemented by DODDIR 6050.7. Neither one is a model of clarity. The Navy, but not the Marine Corps, has published additional regulations, see OPNAVINST 5090.1A, Appendix E, but they add relatively little. Executive Order 12114 and DODDIR 6050.7 are set out in Chapter 17 of the OEBGD (discussed *supra*, at para. 3607.D.1.d), but only for the sake of completeness. Neither is subject to the final governing standards process because DODDIR 6050.16 expressly provides that it does not modify other DOD Directives and Executive Order 12114 itself provides that it is the "United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies. . ." Executive Order 12114, at para. 1-1.

2. Unless otherwise exempted, analysis under Executive Order 12114 is required when a Federal agency considering a major action is unable to rule out all significant environmental impacts outside the United States. See Executive Order 12114, at para. 2-3. Conversely, no formal analysis is required if the agency determines that no significant environmental impact will occur. See Executive Order 12114, at para. 2-5(a)(1). The Executive Order does not provide for an environmental assessment to determine if a significant impact can be ruled out, but agency regulations may provide for a number of less formal documents. See Executive Order 12114, at para. 2-4(a)(iii). DODDIR 6050.7, in fact, does provide for an environmental assessment to determine whether an EIS is required. See DODDIR 6050.7, encl. (2), para. C.9. Under Executive Order 12114, the extent of environmental analysis and the requirements for its documentation depend on where the impact falls. (Actions in Antarctica, which are subject to NEPA under *EDF v. Massey*, are excluded for purposes of this discussion.)

3. If the impact falls outside the United States and also outside the territory, territorial sea, contiguous zone or "fishery zone" (i.e., EEZ), an EIS is required. See Executive Order 12114, at para. 2-4(b); DODDIR 6050.7, at para. C.4. Note that although procedure for preparing this EIS are very similar to those required under NEPA, the only assured public participation is the opportunity for public comment in the United States. See DODDIR 6050.7, encl. (1).

4. Executive Order 12114 also provides for two other relatively formal documents, an environmental review and an environmental study. DODDIR 6050.7 sets out the requirements for preparing both documents and clarifies that an environmental study is to be a bilateral or multilateral effort with other nations involved in the project. DODDIR 6050.7, encl.(2), para. D. An environmental review is prepared unilaterally by the United States. DODDIR 6050.7, encl.(2), para. E. Either an environmental review or an environmental study is required:

a. If the impact falls outside the United States, but inside the territory, territorial sea, contiguous zone, or EEZ of another country. See Executive Order 12114, at para. 2-4(b);

b. If the action will result in a principal byproduct or effluent which is prohibited or strictly regulated in the United States because it could create a serious public health risk or would be prohibited or strictly regulated because of the danger of radioactive substances. See Executive Order 12114 at para. 2-4(c);

c. If the action will significantly affect natural or ecological resources of global importance that are identified by the President, or if the resources are the subject of a treaty to which the United States is a party, that are identified by the Secretary of State.

5. Executive Order 12114 does not require *any* formal documentation under para. 2-3(b) if the significant impacts will fall solely within a country participating in the action with the United States. See Executive Order 12114, at para. 2-3; DODDIR 6050.7, encl. (2). However formal documentation may still be required under para. 2-3(c) or (d) of Executive Order 12114, even with a participating nation. See DODDIR 6050.7, encl. (2), para. B.2.

6. Executive Order 12114 achieves broad flexibility necessary to protect foreign affairs interests by a liberal series of exemptions. See Executive Order 12114, at para. 2-5(a). These exemptions include a general exemption when an agency determines there will be no significant effect on the environment, and more specific exemptions for actions taken by the President, actions by or under the direction of the President or Cabinet officer for actions involving national security or action occurring the course of armed conflict and actions for disaster and emergency relief. *Id.*

7. Additional flexibility is achieved by procedures for modifying the contents, timing and availability of documents depending on considerations that include time factors, diplomatic factors, national security concerns and others. See Executive Order No. 12114 at para. 2-5(b).

8. Agencies are also permitted to include categorical exclusions in their implementing regulations to meet emergency circumstances, foreign policy, and national defense sensitivities. *Id.* There must be consultation with the Department of State before any such categorical exclusions are adopted. The Navy has not undergone that consultation with respect to its published categorical exclusions, 32 C.F.R. Part 775, and accordingly they cannot be used under Executive Order 12114.

9. Compliance with Executive Order 12114 is mandatory for Executive Branch agencies but the order does not create a cause of action subject to judicial review. See Executive Order 12114, at para. 3-1.

B. **Proposals to Review Policy.** Following the decision in *EDF v. Massey*, *supra*, and the decision not to appeal, the President directed review of the policy on analysis of actions having environmental impacts overseas. Under Policy Review Decision-23, the National Security Council has chaired a year long interagency effort to make recommendations on whether NEPA should be applied overseas, whether Executive Order 12114 should be retained or whether a mixed approach should be adopted. The interagency process is close to producing recommendations that may result in a revised executive order or possibly more dramatic changes. Counsel must be alert to developments in this area.

3610 ENVIRONMENTAL COMPLIANCE DURING OPERATIONS AND EXERCISES. Special environmental compliance measures, above and beyond those provided in OPNAVINST 5090.1A or Marine Corps Order 5090.2, during operations and exercises, should normally be addressed in the operation order or similar tasking directive. There may also be applicable component or theater directives or messages that must be consulted by counsel. See also JCS Publication 4-04, "Joint Doctrine for Civil Engineering Support."

3611 POINTS OF CONTACT.

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F. Defense Environmental Network and Information Exchange (DENIX),
Navy News forum, EURONEWS (computer bulletin board)

G. National Park Service, Special Assistant for World Heritage Convention
- (202) 208-4621

CHAPTER XXXVII

ENVIRONMENTAL ISSUES IN ACQUISITION

3701 REFERENCES

- A. DOD Directive 5000.1, Subj: DEFENSE ACQUISITION
- B. DOD Instruction 5000.2, Subj: DEFENSE ACQUISITION
MANAGEMENT POLICIES AND PROCEDURES
- C. DOD Manual 5000.2M, Subj: DEFENSE ACQUISITION
MANAGEMENT DOCUMENTATION AND REPORTS
- D. Federal Acquisition Regulation (FAR), 48 C.F.R. Ch. 1
- E. DOD Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R.
Ch. 2
- F. Navy Acquisition Procedures Supplement (NAPS), 48 C.F.R. Ch. 52

3702 OVERVIEW. Defense acquisition is a process that begins with the definition of a mission need and continues through the contracting phase, whereby an item or service is purchased to fulfill the mission requirement. The process is governed throughout by numerous laws and regulations, covering various subjects, including requirements definition, acquisition planning, competition in contracting, contract administration, and a collection of what may be termed collateral topics. This last group consists of Federal laws and policies that are applied to the acquisition process primarily to further social or economic goals. Included in this group are environmental laws and regulations. This chapter focuses on environmental compliance issues that have been known to arise in the course of the acquisition process.

3073 DEFENSE ACQUISITION AND THE NATIONAL ENVIRONMENTAL POLICY ACT

A. ***Regulatory framework for defense acquisition management.*** For Navy, policy implementation of the numerous Federal acquisition statutes is found, in large part, in references (a) through (f). Management of defense acquisition by the Department of Defense (DOD) components (including Navy and Marine Corps) is governed by the policies and procedures in references (a), (b), and (c). As noted in paragraph B. 2. of reference (a), that Directive and reference (b) ". . . rank first and second in order of precedence for providing policies and procedures for managing acquisition programs, except when statutory requirements override. If there is any conflicting guidance related to contracting, the Federal Acquisition Regulation (FAR) and / or the Defense Federal Acquisition Regulation Supplement (DFARS) shall take precedence . . ." over references (a) and (b). Reference (c) is the Manual containing procedures and formats for the various defense acquisition documentation and reports that are required by references (a) and (b). Section 6-1 of reference (b) and Part 4, Section F, Annex E of the Manual (reference (c)) address the National Environmental Policy Act (NEPA) regulations, and include procedures for preparation of a programmatic environmental analysis. This analysis is to be integrated with other considerations in the program management and acquisition process.

B. ***Program milestones and NEPA documentation.*** One issue that has been raised within DOD, is whether DOD Directive (DOD Dir) 5000.2 requirements for "initial" and "programmatic" environmental analyses equate to the "environmental analysis" documentation contemplated by NEPA and its regulations. DOD Dir 5000.2 recognizes that NEPA's statutory (and implementing regulatory) definitions and requirements would take precedence. Thus, if a defense acquisition program being managed pursuant to references (a) through (c) would constitute a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, then analysis and documentation as required by NEPA and implementing regulations must be prepared at the appropriate time. (See Chapter 26 regarding NEPA and Regulations). This may or may not mean that a major acquisition program at, for example, "Milestone I: Concept Demonstration Approval" (as defined in reference (b)), must accomplish an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) pursuant to NEPA before that program may be approved by the Milestone Decision Authority for transition into the next phase of the acquisition process. The answer to whether or not NEPA documentation is required, and at what point it is required, is presently found under NEPA and its implementing regulations. The management milestone reached by a program will not, in and of itself, necessarily trigger NEPA documentation requirements. This reflects the related, but separate evolutions of the acquisition management process and NEPA implementation. However, even where a defense acquisition program does not trigger NEPA requirements, some form of environmental impact assessment may be required by references (b) and (c). See reference (b), Part 6, Section I, paragraph

3.d., "Environmental Protection." This subject must continue to be carefully monitored by program managers and attorneys as increased attention and emphasis on environmental compliance is brought to the forefront of the acquisition process.

3704 ENVIRONMENTAL QUALITY AND FEDERAL ACQUISITION REGULATIONS

A. *Where to find regulatory coverage.* The Federal acquisition regulations applicable to Navy are contained in references (d) through (f). Policies and procedures supporting environmental quality can be found at FAR, 48 C.F.R. Part 23, DFARS, 48 C.F.R. Part 223, and NAPS, 48 C.F.R. Part 5223. In addition, regulations implementing the limitation on contracting for items or services involving Class I ozone depleting substances is contained in DFARS, 48 C.F.R. Subparts 207 and 210, (interim rule of May 21, 1993), and in NAPS, 48 C.F.R. Subparts 5210.002-71 and 5252.210-9000 (effective August 18, 1993).

B. *Environmental quality and workplace safety.* FAR, 48 C.F.R. Part 23, prescribes acquisition policies and procedures supporting improvement in the quality of the environment through pollution control, energy conservation, identification of hazardous material, and use of recovered materials. DFARS, 48 C.F.R. Part 223, and NAPS, 48 C.F.R. Part 5223, supplement the FAR coverage for DOD, and for the Navy, respectively. The general format followed by the FAR, DFARS, and NAPS is to set out applicable policies and procedures for implementing those policies. For some of the policies, solicitation provisions and contract clauses are prescribed. For others, the policy is directed at the solicitation preparation and offer evaluation stages, without prescribed provisions or clauses.

1. *Clean Air Act (CAA) and Clean Water Act (CWA).* The first topic covered in FAR, Subpart 23.1, is the limit on contracting with firms proposing to use a facility listed by the Environmental Protection Agency (EPA) for violation of the CAA or CWA. This regulatory coverage is required by both Acts and by the Executive order implementing the Acts, Executive Order 11738, Sept. 10, 1973, 38 Fed. Reg. 25161, Sept. 12, 1973. (The Executive order also appears as a note under 42 U.S.C. § 7606). Basically, the regulation tracks the statutory requirements (see 42 U.S.C. § 7606 of the CAA and 33 U.S.C. § 1368 of the CWA), and the Executive order. With some exceptions, Federal agencies are prohibited from entering into, renewing, or extending contracts with firms proposing to use facilities listed by EPA (see 40 C.F.R. Part 15) as violating facilities under the CAA or the CWA.

FAR, 48 C.F.R. Subpart 23.1, does not apply to small purchases (see FAR, 48 C.F.R. Part 13) or to use of facilities outside the United States. See *G.W. Inc.*, B-225143, 87-1 CPD P 240, March 3, 1987, where the CAA and CWA provisions' inapplicability to foreign performance were challenged as granting an

Consolidated Environmental Law Deskbook

unfair competitive advantage to foreign firms. The Comptroller General denied the protest, holding there is no requirement that procuring activities equalize whatever competitive advantages foreign firms may have because they are not subject to the same socio-economic requirements (such as those cited by the protester) as domestic firms.

FAR, 48 C.F.R. Subpart 23.104, exempts from the prohibition described above contracts and subcontracts valued at \$100,000.00 or under. However, that exemption does not apply if the facility to be used is listed by EPA for a **conviction** under either Act. A second exemption may be exercised by the agency head (DFARS, 48 C.F.R. Part 223.104, requires that this function must be performed by an agency official no lower than one appointed by and with the consent of the Senate), when it is in the paramount interest of the United States to do so. The agency head, or designee, may only grant such an exemption for up to one year and must notify the EPA Administrator or designee as soon as practicable after granting an individual exemption. The notification must describe the purpose of the contract and explain why the paramount interest of the United States required the exemption. Before granting a class exemption under FAR, 48 C.F.R. Subpart 23.104(c), the official must consult with EPA.

The clean air and water contract limitations are communicated to and imposed on Federal contractors through solicitation provisions and contract clauses, found at FAR, 48 C.F.R. Subpart 52.223-1, Clean Air and Water Certification, and at FAR, 48 C.F.R. Subpart 52.223-2, Clean Air and Water. The solicitation provision calls for offerors to certify whether any facility proposed to be used in performance of the contract is listed. If any such facility is, or will be listed, that offeror cannot receive the contract absent an exemption. Once a contract is awarded, the contractor commits via FAR, 48 C.F.R. Subpart 52.223-2 to: (1) comply with specific CAA and CWA requirements (e.g., inspection and monitoring); (2) not to perform at a "listed" facility; (3) to use best efforts to comply with clean air and water standards; and (4) to insert the substance of the clause into nonexempt subcontracts. Although these provisions implement the statutory limit on the Federal agencies' authority to contract with firms proposing to use listed, violating facilities, FAR, 48 C.F.R. Subpart 23.107, notes that primary responsibility for ensuring compliance with Federal, State, or local pollution control laws rests with the EPA and other agencies designated under the laws. However, contracting officers are directed to notify their respective agency heads if they become aware of noncompliance with clean air or water standards in facilities used in performing nonexempt contracts. The agency head or designee is also directed to notify the EPA Administrator or a designee, in writing.

On occasion, a bidder (one who submits a "sealed bid" in response to a Government-issued Invitation For Bids (IFB)), may fail to complete the clean air and water certification provision, or might check the wrong box, in its bid. The

Comptroller General, in reviewing protests against awards made on bids containing these defects, has ruled the failure or mistake to be correctable by the potential awardee up until time of award. In procurement parlance, a bidder's certification or failure to certify under the Clean Air and Water provision is a matter of "responsibility" (i.e., the bidder's ability to perform, rather than a matter of responsiveness, or whether the bidder has unequivocally offered to provide goods or perform services in exact conformity with the solicitation). See *Matter of Grifco*, B-240549, 90-2 CPD P 143, Aug. 17, 1990; *Syllor, Inc. and Ease Chemical*, B-234724, 89-1 CPD P 530, June 6, 1989. Cf. *G.W., Inc.*, B-222571, 86-2 CPD P 225, Aug. 26, 1986, where the requirement for an offeror to notify the contracting activity prior to award if a proposed subcontractor was under consideration for listing on the EPA's List of Violating Facilities was justification for the agency's use of the competitive negotiation process rather than the sealed bid process. (The choice of sealed bidding vs. competitive negotiation is an acquisition **process** issue occasionally raised by a protester in relation to the Competition in Contracting Act of 1984; see 10 U.S.C. § 2304 and FAR, 48 C.F.R. Subpart 6.102. It is an issue not directly related to environmental compliance by government contractors.)

2. **Energy conservation.** Subpart 23.2, addresses energy conservation, under the Energy Policy and Conservation Act (41 U.S.C. § 6361(a)(1)), and Executive Order 11912, April 16, 1976, as amended by Executive Order 12038, February 3, 1978, and Executive Order 12148, July 20, 1979. This Subpart deals with the Federal policy to buy energy efficient consumer products. Consumer products, as used in the subpart, are defined at 23.202. In addition, the subsection contains a list of "covered" consumer products, with room for additions to the list as the Secretary of Energy may classify under 42 U.S.C. § 6292(b). No solicitation provisions or contract clauses are prescribed by this subpart. Instead, the policy at FAR, 48 C.F.R. Subpart 23.203, promotes use of energy conservation and efficiency criteria in acquisitions, and directs that in preparing solicitations and evaluating and selecting offers for award, agencies shall consider these criteria along with price and other relevant factors.

3. **Recycling.** Acquisition of recovered materials (recycling) pursuant to the Resource Conservation and Recovery Act (RCRA) of 1976, as amended, (42 U.S.C. §§ 6901, *et. seq.*), is addressed in FAR, 48 C.F.R. Subpart 23.4. Basically, this subpart describes the specification drafters' and reviewers' obligation under RCRA to require the use of recovered materials to the maximum extent consistent with the intended use of the item being described. The contracting officer is assigned a role in FAR, 48 C.F.R. Subpart 23.404 (b). The contracting officer may waive the requirement for using recovered materials only after determining that the items containing recovered materials are not available within a reasonable period of time, or are available only at unreasonable prices, or fail to meet performance standards. A solicitation provision, FAR, 48 C.F.R. Subpart 52.223-4, Recovered Material Certification, is prescribed for solicitations that incorporate specifications

requiring the use of recovered materials. The certification states the offeror certifies by signing the offer that recovered materials, as defined in FAR, 48 C.F.R. Subpart 23.402, will be used as required by the applicable specifications. Like the Clean Air and Water certification, the Recovered Material Certification was found by the Comptroller General to be a matter of responsibility under an IFB, that may be verified or corrected after bid opening. *Grifco, supra.*

C. **Limitations on contracts involving Class I ozone depleting substances.** Section 326 of the Defense Authorization Act for Fiscal Year 1993 (Pub. L. No. 102-484) placed restrictions on the award and modification of contracts that require the use of ozone-depleting substances. Section 326 was implemented in DFARS, 48 C.F.R. Parts 207 and 210, via an interim rule issued by OUSD(DDP) memorandum of May 21, 1993. The Navy implemented by Assistant Secretary of the Navy (Research, Development and Acquisitions) (ASN(RDA)) memorandum of May 28, 1993, Subj: Elimination of Use of Class I Ozone Depleting Substances (ODS), and by an August 18, 1993, OASN(RDA) (Acquisition Policy) memorandum (same subject) which issued an advance change to the NAPS. The advance NAPS coverage was effective on August 18, 1993, and will be included in a future issuance of the NAPS itself.

1. **DFARS implementation.** The statute and implementing DFARS coverage prohibit contract awards beginning on June 1, 1993, where the contract would contain a specification or standard that requires the use of a Class I ODS, or that could only be met through the use of a Class I ODS, unless the senior acquisition official (SAO) for the procurement approves such use. The SAO for the procurement can't approve such an award unless the approval is based on a technical certification and determination that no suitable alternative is currently available. In addition, the statute requires that not later than 60 days after the first, post-June 1, 1993, modification of an existing contract over \$10 million, where as a result of that first, post-June 1, 1993, modification the contract would be completed more than one year after the modification's effective date, an evaluation of that contract must be performed and the SAO (or designee) must determine whether the contract includes a specification or a standard that requires the use of a Class I ODS or that can only be met through the use of a Class I ODS. The statute prohibits further modification, amendment, or extension of the contract until the evaluation described in the statute is completed.

If the designated official determines Class I ODS is specified in the contract, the official must then determine whether the contract may be carried out through the use of an economically feasible substitute or alternative technology. If a substitute is determined to be available, the contracting officer must enter into negotiations to modify the contract to require the use of the substitute. The contract price may be adjusted, consistent with FAR and DFARS. A determination that no substitute is available must be made in writing by the SAO.

2. **Navy implementation.** NAPS, 48 C.F.R. Part 5210, now contains procedures to be followed in Navy for elimination of Class I ODS. Three key terms are defined: "**Appropriate Technical Representative**," "**requiring activity**," and "**Senior Acquisition Official**." The defined terms, as used in the subsections covering "technical reviews and approvals" and "reporting requirements," place primary responsibility for reviewing procurement specifications and standards for Class I ODS with the technical and requiring activities, rather than with the contracting officers. The general scheme is for the activity originating a purchase request (the "requiring activity") or other "Appropriate Technical Representative" (an individual having requisite technical expertise and knowledge to provide a competent certification) to be responsible for reviewing specifications and standards in the procurement for Class I ODS, for providing certifications where no substitutes are identified, or for identifying suitable substitutes, and for the SAO (an official at a level no lower than a general or flag officer or member of the Senior Executive Staff (SES) within the requiring activity's chain of command) to execute approvals or make determinations as required.

NAPS 48 C.F.R. §§ 5210.002-71-91, Technical Reviews and Approvals, paragraph (c) states in pertinent part:

If an SAO approval or determination is obtained, the requiring activity shall include the approval or determination in the procurement request (PR) package submitted to the contracting office. Upon receipt of a PR package which does not include an SAO approval or determination, the contracting officer may conclude, absent knowledge to the contrary, that the procurement uses no Class I ODS.

This language reflects Navy policy that places the responsibility for compliance with the ODS requirements of section 326 and the DFARS primarily on the requiring activities, as they would be in the best positions to make informed reviews and determinations regarding requirements. Navy contracting officers, who rely solely on the requirements chain of command, would be acting in accordance with applicable Navy policy. However, as of this writing, the policy has not been the subject of any challenges. Thus, Navy contracting officer clients should be advised that the statute places controls on the award and modification of contracts. This means that contracting officers should take steps to verify that requiring and technical activities have in fact performed requisite reviews, particularly in cases where the PR package does not indicate the results of such a review. Contracting officers should be made aware that such a conclusion could be factually erroneous, and that reliance on the absence of an approval or determination in a PR package may result in the contracting officer signing a contract or modification specifying or requiring use of a Class I ODS.

The DFARS does not require contractors to certify that their contracts or potential contracts are "ODS-free." By memorandum of October 20, 1993, the Director of Defense Procurement, Office of the Secretary of Defense (OSD), directed the services to "take appropriate action to ensure that your field contracting activities discontinue the use of any clause dealing with ozone-depleting substances that impose a burden on contractors." This was in response to concerns expressed by potential contractors that the military contracting activities had been using unapproved clauses that require contractors to identify any Class I ODS's referenced in specifications. NAPS, 48 C.F.R. Part 5210.011-90, does allow for encouraging, but not requiring, contractors to share whatever knowledge they might have regarding Class I ODS's required by specifications or standards in a solicitation. The contracting officers are permitted to include a provision substantially similar to the provision at NAPS, 48 C.F.R. Part 5252.210-9000, "Notice to Offerors-Use of Class I Ozone Depleting Substance," in solicitations. The provision invites information, and specifies that offerors are under no obligation to comply with such a request, and that no compensation can be provided for doing so.

3705 ENVIRONMENTAL COSTS UNDER DEFENSE CONTRACTS

A. **Overview.** Environmental law practitioners are familiar with issues concerning who bears liability for costs incurred in preventing and remedying environmental damage. To understand the circumstances under which the Government is authorized and required to reimburse a contractor under a government contract for environmental costs, a familiarity with applicable acquisition regulation cost principles is helpful.

Questions may arise in the pricing of a contract, often in a noncompetitive setting (where the contractor's price has not been arrived at under full and open competition, for example, but in a negotiation between the contractor and the Government), or, under similar circumstances, where a contract price is being renegotiated due to a change during performance of the contract, or where the terms of the contract specifically call for a resetting of estimated or target costs and prices. In such situations, the government representative may take a position that a particular cost (such as the cost incurred by the contractor to clean up a contractor-owned site) is not *allowable* under the particular contract being negotiated, because the cost is either *unreasonable* or not *allocable* to that contract. In other cases, the question may come up during negotiations to set a contractor's forward pricing rates in an agreement with the Government. These situations may be of more direct interest to attorneys who advise contracting personnel. For such practitioners, more detailed guidance on the FAR cost principles and on contract types is to be found in other chapters of the Navy Office of the General Counsel (OGC) Deskbook. The following discussion is intended to be introductory only and should illustrate the level

of complexity that can be reached in any discussion concerning the treatment of environmental costs under government contracts.

B. *FAR cost principles*

FAR, 48 C.F.R. Subpart 31 (and, to a lesser extent, DFARS, 48 C.F.R. Part 231), include cost principles that apply to certain defense contract actions to determine what costs incurred by a defense contractor are payable by the government. Applicability of the cost principles to various types of contracts and subcontracts is addressed in FAR, 48 C.F.R. Subpart 31.1. It should be noted that the applicability of the FAR cost principles is determined not only by the type of contract or subcontract being considered (e.g., fixed price type or cost-reimbursement type), but also by the nature of the entity with whom the government is contracting. For example, FAR, 48 C.F.R. Subpart 31.2, applies to contracts with commercial organizations; 31.3 applies to contracts with educational institutions; 31.6 to contracts with state, local, and federally recognized Indian Tribal governments; and 31.7 to contracts with nonprofit organizations. In addition, where a cost allowability question arises under an existing contract, the issue date of the contract and the clauses contained therein, will be relevant in determining precisely which edition of the cost principles applies to that particular contract.

The cost principles set out general rules, as well as a series of specific principles that address individual categories of costs. For contracts with commercial organizations, where a specific cost principle (set out in FAR, 48 C.F.R. Subpart 31.205) applies to a cost, the policy therein must be consulted, along with the general rules, to determine whether a cost is allowable under the particular government contract or contracts. See FAR, 48 C.F.R. Subpart 31.204(a), which states: "Costs shall be allowable to the extent they are reasonable, allocable, and determined to be allowable under 48 C.F.R. §§ 31.201, 31.202, 31.203, and 31.205. These criteria apply to all of the selected items that follow (at FAR, 48 C.F.R. Subpart 31.205), even if particular guidance is provided for emphasis or clarity." The criteria for cost allowability are set out at FAR, 48 C.F.R. Subpart 31.201-2. Briefly, the factors used in determining whether a cost is allowable under the FAR are: reasonableness, allocability, applicable accounting principles, the terms of the contract, and any limitations set out in subpart 31.201 of the FAR. These factors are discussed in detail in subpart 31.201, and application of the principles and procedures of the subpart are set out at 31.204.

As of this writing, no specific environmental cost principle exists. A draft FAR Environmental Cost Principle was floated by DOD under DAR Case 91-056 in 1992. The draft principle would have provided specific policy on the treatment of environmental clean-up costs, as well as on costs incurred primarily to prevent environmental damage, to dispose of business-generated waste, or to comply with Federal, state, or local environmental laws and regulations. However, due in part to

a presidential moratorium on new regulatory issuances, the principle was not issued. In the absence of a specific principle, the FAR's general criteria for cost allowability are applicable to determine under what circumstances a contractor may recover environmental costs under a government contract.

For a discussion of the history of the acquisition regulation cost principles, see *Lockheed Aircraft Corp. v. United States*, 375 F.2d 786 (Ct. Cl. 1967).

C. *Defense contract audit agency guidance*

Since they are general, the impact of the FAR cost principles of allowability in a particular circumstance cannot always be precisely pinpointed and disputes over interpretation of these principles do arise. This inherent uncertainty was one impetus behind the initiation of DAR Case 91-056. Although a specific environmental cost principle was not promulgated, guidance on the application of the general allowability principles was issued by the Defense Contract Audit Agency (DCAA) in an audit guidance paper dated October 14, 1993. This guidance discusses three categories of environmental costs: costs to prevent environmental contamination, costs to clean up prior contamination, and costs directly associated with the first two categories, including legal costs. The paper states that environmental costs are normal costs of doing business that are generally allowable if reasonable and allocable. It also points out that environmental cleanup costs incurred as a result of contamination caused by the contractor are unallowable costs that cannot be charged to the government. A "key concept" for reasonableness of environmental costs is stated as follows: "... the methods employed and the magnitude of the costs incurred in a preventive or remedial environmental activity must be consistent with the prudent actions expected of an ordinary, reasonable, prudent business person performing non-government contracts in a competitive marketplace. A government contractor should take measures to prevent or reduce contamination which a prudent businessperson would pursue to reduce its environmental costs."

The DCAA environmental cost guidance also covers the following topics: allocability of environmental costs to government contracts (preventive costs will generally be treated as indirect expense using a causal or beneficial base; cleanup costs are to be allocated in accordance with Cost Accounting Standard (CAS) 403 to the segment(s) associated with the contamination which in turn should allocate the costs to contracts in accordance with CAS 410 as part of the segment residual G&A costs); the appropriate treatment of costs from a contractor's previous worksite (i.e., to which site the costs should be allocated); capitalization of environmental costs; responsibility for cleanup as a potentially responsible party (PRP) (a contractor who cannot collect contribution or subrogation claims from other PRPs will be holding unallowable "bad debts," under FAR, 48 C.F.R. Subpart 31.205-3 and 31.204(c)); insurance recovery for environmental costs; payments to third parties due to fault-

based liabilities (in the absence of a court finding of fault, examine on case-by case basis to determine if contractor's payments are otherwise based on fault-based legal theories); environmental wrongdoing (costs resulting from violation of laws or regulations, or disregard of warnings of potential contamination would be unreasonable and therefor unallowable). The Guidance ends with a discussion of the utility of advance agreements for the negotiation of treatment of environmental costs under defense contracts. Such agreements are encouraged, given the "many areas of judgment involved in the determination of allowability for environmental costs."

APPENDIX I**COMMON ENVIRONMENTAL ACRONYMS**

AA EPA	Assistant Administrator Environmental Protection Agency
ACHP	Advisory Council on Historic Preservation (36 C.F.R. Part 800)
ACNO	Assistant Chief of Naval Operations
ACO	Administrative Consent Order
ADA	Anti-Deficiency Act (31 U.S.C. §§ 1241, 1342, 1349-1351 and 1511-1519)
AESO	Aircraft Environmental Support Office
AGC	Assistant General Counsel
AGC (I&E)	Assistant General Counsel (Installations & Environment)
AGL	Above Ground Level
AHERA	Asbestos Hazard Emergency Response Act of 1986 (see TSCA)
AHPA	Archeological & Historical Preservation Act of 1974 (16 U.S.C. §§ 469 <i>et seq.</i>)
AICUZ	Air Installation Compatible Use Zone
AIRFA	American Indian Religious Freedom Act (42 U.S.C. § 1996)
ALJ	Administrative Law Judge
AO	Administrative Order
AOR	Area of Responsibility
APA	Acid Precipitation Act of 1980 (42 U.S.C. §§ 8901 <i>et seq.</i>)
APA	Administrative Procedure Act (5 U.S.C. §§ 551-559, 701-703)
APN	Aircraft Procurement, Navy
APZ	Accident Potential Zone

AQCR	Air Quality Control Region
AQMD	Air Quality Management District
ARAR	Applicable or Relevant and Appropriate Requirements
ARPA	Archeological Resources Protection Act of 1979 (16 U.S.C. §§ 470aa <i>et seq.</i>)
APPA	Act to Prevent Pollution from Ships (33 U.S.C. § 1901)
ASN(I&E)	Assistant Secretary of the Navy for Installations and the Environment
ATSDR	Agency for Toxic Substances & Disease Registry
BACT	Best Available Control Technology
BASH	Bird Aircraft Strike Hazard
BAT	Best Available Technology Economically Achievable
BCP	Base Comprehensive Planning
BCT	Best Conventional Pollution Control Technology
BDAT	Best Demonstrated Available Technology
BMP	Best Management Practice
BOD	Biochemical Oxygen Demand
BPJ	Best Professional Judgement Control Technology Currently Available
BPT	Best Practicable Control Technology
BRAC	Base Realignment and Closure
BSEC	Base Structure Evaluation Committee
BSAT	Base Structure Analysis Team
BUMED	U.S. Navy Bureau of Medicine and Surgery
CAA	Clean Air Act (42 U.S.C. §§ 7401 <i>et seq.</i>)

CAPA	Critical Aquifer Protection Area
CATEX	Categorical Exclusion
CCD	Coastal Consistency Determination
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation & Liability Act of 1980 (42 U.S.C. §§ 9601 <i>et seq.</i>)
CERFA	Community Environmental Response Facilitation Action (Pub. L. No. 102-426 (Oct 19, 1992))
CERCLIS	Comprehensive Environmental Response, Compensation and Liability Information System
CFC	Chlorofluorocarbon
CFR	Code of Federal Regulations
CFST	Contaminated Fuel Settling Tank
CHINFO	Chief of Information
CHT	Collection, Holding & Transfer System
CINC	Commander-in-Chief
CMC	Commandant of the Marine Corps
CNEL	Community Noise Emission Level
CNET	Chief of Naval Education and Training
CNO	Chief of Naval Operations
CO	Carbon Monoxide
CO	Commanding Officer
COBRA	Cost of Base Realignment Actions
COCO	Contractor-Owned, Contractor-Operated Facility

COD	Chemical Oxygen Demand
COE	Corps of Engineers, U.S. Army
COMNAVFACENGCOM	Commander, Naval Facilities Engineering Command
COMNAVRESFOR	Commander, Naval Reserve Force
COMNAVSUPSYSCOM	Commander, Naval Supply System Command
COMSC	Commander, Military Sealift Command
CONUS	Continental United States
COTR	Contracting Officer's Technical Representative
C3P2+T	Cleanup, Compliance, Conservation, and Pollution Prevention, Plus Technology
CRP	Community Relations Plan
CUD	Compatible Use District
CWA	Clean Water Act (see FWPCA)
CWT	Centralized Waste Treatment
CY	Calendar Year
CZ	Clear Zone
CZMA	Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 <i>et seq.</i>)
DAF	Dilution / Attenuation Factors
dB	Decibel
DCA	Dichloroethane
DCNO	Deputy Chief of Naval Operations
DCO	Delayed Compliance Order

DEIS	Draft Environmental Impact Statement
DEPSECDEF	Deputy Secretary of Defense
DERA	Defense Environmental Restoration Account
DERP	Defense Environmental Restoration Program
DESR	Defense Environmental Status Report
DFM	Diesel Fuel, Marine
DLA	Defense Logistics Agency
DMR	Discharge Monitoring Report
DMSO	Directions of Major Staff Offices
DNL	Day-Night Average Sound Level (Also LDN)
DO	Dissolved Oxygen
DOC	Department of Commerce
DOD	Department of Defense
DODDIR	Department of Defense Directive
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DON	Department of the Navy
DOT	Department of Transportation
DRC	Dispute Resolution Committee
DRMO	Defense Redistribution & Marketing Office

DRMS	Defense Redistribution & Marketing Service
DSMOA	Defense / State Memorandum of Agreement
DTRC	David Taylor Research Center
DUSD(ES)	Deputy Upper Secretary of Defense (Environmental Security)
EA	Environmental Assessment
EA	Endangerment Assessment
EA	Executive Assistant
EACO	Eastern Area Counsel Office
EC	Environmental Coordinator
ECAMP	Environmental Compliance Assessment & Management Program
ECE	Environmental Compliance Evaluation
ECRS	Environmental Compliance Reporting System
EDF	Environmental Defense Fund
EEZ	Exclusive Economic Zone
EFA	Engineering Field Activity
EFD	Engineering Field Division
EHM	Extremely Hazardous Material
EHS	Extremely Hazardous Substance
EIAP	Environmental Impact Analysis Process
EIS	Environmental Impact Statement
ELO	Environmental Law Office
EM	Environmental Management Function
EO	Executive Order

EOD	Explosive Ordinance Disposal
EPA	Environmental Protection Agency
EPC	Environmental Protection Committee
EPCRA	Emergency Planning & Community Right-to-Know Act (42 U.S.C. §§ 11001 <i>et seq.</i>)
EPF	Environmental Planning Function
ERC	Emission Reduction Credits
ESA	Endangered Species Act (15 U.S.C. §§ 1531 <i>et seq.</i>)
ESP	Electrostatic Precipitation
EU	European Union (formerly European Community (EC))
FAA	Federal Aviation Authority
FCLP	Field Carrier Landing Practice
FEIS	Final Environmental Impact Statement
FEMA	Federal Emergency Management Agency
FFA	Federal Facilities Agreement
FFCA	Federal Facilities Compliance Agreement
FFCA	Federal Facilities Compliance Act (Pub.L. No. 102-386, 106 ???? 1505 (1992))
FGD	Flue Gas Desulfurization
FGS	Final Governing Standards
FICUN	Federal Interagency Committee on Urban Noise
FIFRA	Federal Insecticide, Fungicide & Rodenticide Act (7 U.S.C. §§ 136 <i>et seq.</i>)
FIP	Federal Implementation Plan
FLPMA	Federal Land Policy Management Act (43 U.S.C. §§ 1701 <i>et seq.</i>)

FMP	Fleet Modernization Program
FOIA	Freedom of Information Act (5 U.S.C. § 552)
FONSI	Finding Of No Significant Impact
FOSL	Funding of Suitability to Lease
FOTW	Federal Owned Treatment Works
FR	Federal Register
FS	Feasibility Study
FTCA	Federal Tort Clams Act (28 U.S.C. §§ 1346(b), 2671, 2672 and 2673, 2680)
FUDS	Formerly Used Defense Sites
FWPCA	Federal Water Pollution Control Act (33 U.S.C. §§ 1251 <i>et seq.</i>)
FWS	U.S. Fish & Wildlife Service, Department of the Interior
FYDP	Fiscal Year Defense Program
Gal	Gallon
GAO	Government Accounting Office
GC	General Counsel
GEP	Good Engineering Practice
GOCO	Government Owned-Contractor Operated Industrial Facility
GSA	General Services Administration
HABS	Historic American Buildings Survey
HAER	Historic American Engineering Record
HARM	Hazard Assessment Rating Methodology
HARP	Historic Archaeological Resources Protection

HAZMIN	Hazardous Waste Minimization
HC	Hydrocarbons
HCS	Hazard Communication Standard
HM	Hazardous Material (also HAZMAT)
HMIS	Hazardous Material Information System
HMTA	Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 <i>et seq.</i>)
HMTID	Hazardous Material Turned into Disposal
HMTIS	Hazardous Material Turned into Store
HOC	Halogenated Organic Compounds
HRS	Hazard Ranking System
HS	Hazardous Substance
HSWA	Hazardous & Solid Waste Amendments of 1984 (see RCRA)
HUD	U.S. Department of Housing and Urban Development
HW	Hazardous Waste
IAG	Interagency Agreement
IDA	Initial Denial Authority
IG	Inspector General
I/M	Inspection and Maintenance
IMO	International Maritime Organization (formerly IMCO)
IOAA	Independent Offices Appropriation Act
IR	Installation Restoration
IRP	Installation Restoration Program
ISSA	Interservice Support Agreement

ITS	Incidental Take Statement
IWPP	Industrial Waste Pretreatment Process
IWTP	Industrial Wastewater Treatment Plant
JAG	Judge Advocate General
Kg	Kilogram
KVA	Kilovolt-ampere
LAER	Lowest Achievable Emission Rate
Ldn	Day Night Average Sound Level
LEP	Local Emergency Plan
LEPC	Local Emergency Planning Committee
LFL	Installations Logistics Department, Facilities and Services Division, Land Use and Military Construction Branch
LLRWPA	Low-Level Radioactive Waste Policy Act (42 U.S.C. § 2021b-j)
LOA	Letter of Authorization
LOGREQ	Logistics Requirements
LQG	Large Quantity Generator
LTM	Long Term Monitoring
MACT	Maximum Achievable Control Technology
MARPOL	International Maritime Convention on the Prevention of Pollution from Ships
MBTA	Migratory Bird Treaty Act (16 U.S.C. §§ 703 <i>et seq.</i>)
MCA	Military Claims Act (10 U.S.C. § 2733)
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal

MCO	Marine Corps Order
MCP	Military Construction Program
MEK	Methyl Ethyl Ketone
MEP	Maximum Extent Practicable
MESO	Marine Environmental Support Office
MFASAQHE	Major Federal Action Significantly Affecting the Quality of the Human Environment
MILCON	Military Construction
MMPA	Marine Mammal Protection Act of 1972 (16 U.S.C. §§ 1361 <i>et seq.</i>)
MO	Manual of Operation
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
MPRSA	Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. §§ 1401 <i>et seq.</i>)
MRC	Maintenance Requirement Card
MSC	Military Sealift Command
MSD	Marine Sanitation Device
MSDS	Material Safety Data Sheet
MSW	Municipal Solid Waste
MSWLF	Municipal Solid Waste Landfill Facility
MTR	Minimum Technology Requirements
MWR	Morale, Welfare, and Recreation
NAAQS	National Ambient Air Quality Standards

NAGPRA	Native American Graves Protection and Repatriation Act (25 U.S.C. §§ 3001 <i>et seq.</i>)
NAPC	Naval Air Propulsion Center
NATO	North Atlantic Treaty Organization
NAVAIRSYSCOM	Naval Air Systems Command
NAVCOMPT	Comptroller of the Navy
NAVCOMPTINST	Comptroller of the Navy Instruction
NAVFACENGCOM	Naval Facilities Engineering Command
NAVFACENGCOM EFD:	Naval Facilities Engineering Command Engineering Field Division
NAVGRAM	Naval telegram
NAVMEDCOM	Naval Medical Command
NAVOSH	Navy Occupational Safety and Health
NAVRESO	Navy Resale System Office
NAVSEASYSYSCOM	Naval Sea Systems Command
NAVSPAWARSYSCOM	Naval Space and Warfare Systems Command
NAVSTA	Naval Station
NAVSUPSYSCOM	Naval Supply Systems Command
NBAR	Nonbinding Allocation of Responsibility
NCA	Noise Control Act (42 U.S.C. §§ 4901 <i>et seq.</i>)

NCEL	Naval Civil Engineering Laboratory
NCP	National Contingency Plan (40 CFR Part 300)
NECA	Navy Environment Compliance Account
NEESA	Navy Energy and Environmental Support Activity
NEPA	National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 <i>et seq.</i>)
NEPMG	Navy Environmental Program Management Group
NEPSS	Naval Environmental Protection Support Service
NESHAP	National Emissions Standards for Hazardous Air Pollutants
NESO	Navy Environmental Support Office
NFESC	Naval Facilities Engineering Service Center
NHPA	National Historic Preservation Act (16 U.S.C. §§ 470 <i>et seq.</i>)
NIF	Navy Industrial Fund
NIMBY	Not In My Back Yard
NJAG	Navy Judge Advocate General
NM	Nautical Mile
NMFS	National Marine Fisheries Service
NNPI	Nuclear Propulsion Plant Information
NNPS	Nuclear Propulsion Plant Space
NOAA	National Oceanic and Atmospheric Administration
NOD	Notice of Deficiency
NOI	Notice of Intent
NON	Notice of Noncompliance
NOSC	Naval Oceans Systems Center

NOSC	Navy On-Scene Coordinator
NOSCDR	Navy On-scene Commander
NOTAL	Not to All
NOTW	Navy Owned Treatment Works
NOV	Notice of Violation
NOx	Nitrogen Oxide
NPDES	National Pollutant Discharge Elimination System
NPDWR	National Primary Drinking Water Regulations
NPDWS	National Primary Drinking Water Standards
NPL	National Priorities List
NRC	National Response Center
NRC	Nuclear Regulatory Commission
NRHP	National Register of Historic Places
NRM	National Resource Management
NRMPM	Natural Resources Management Procedures Manual
NRT	National Response Team
NSC	National Security Council
NSPS	New Source Performance Standards
NSTM	Naval Ships Technical Manual
NSWC	Naval Surface Weapons Center
NWP	Nation Wide Permit
NWPA	Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10101 <i>et seq.</i>)
OAGC(I&E)	Office of Assistant General Counsel (Installations and Environment)

OBOS	Other Base Operating Support
OCM	Oil Content Monitor
ODA	Ocean Dumping Act (also known as Marine Protection, Research, and Sanctuaries Act of 1992 (MPRSA), 33 U.S.C. §§ 1401 <i>et seq.</i>)
ODS	Ozone Depleting Substances
OEBGD	Overseas Environmental Baseline Guidance Document
OECM	Office of Enforcement and Compliance Monitoring
OERR	Office of Emergency and Remedial Response
OESO	Ordinance Environmental Support Office
OFA	EPA Office of Federal Activities
OFFE	Office of Federal Facilities Enforcement
OGC	Office of General Counsel
OHS	Oil or Hazardous Substances
OJAG	Office of the Judge Advocate General
OLA	Office of Legislative Affairs
OMB	Office of Management and Budget
O & M	Operations and Maintenance
O & MN	Operations and Maintenance, Navy
OPA	Oil Pollution Action of 1990 (33 U.S.C. §§ 2701 <i>et seq.</i>)
OP-OON	Director, Naval Nuclear Propulsion Program
OPN	Other Procurement, Navy
OPNAV	Office of the Chief of Naval Operations
OPNAVINST	Office of the Chief of Naval Operations Instruction

OPORDS	Operational Orders
OPREP	Operational Report
OSC	On-Scene Coordinator
OSCDR	On-Scene Commander
OSD	Office of the Secretary of Defense
OSD COMPT	Comptroller of the Office of the Secretary of Defense
OSHA	Occupational Safety & Health Act of 1970 (29 U.S.C. §§ 651 <i>et seq.</i>); Occupational Safety & Health Administration
OSOT	On-Scene Operations Team
OSW	Office of Solid Waste
OSWER	Office of Solid Waste and Emergency Response
O-SWOB	Oil-Ship Waste Offload Barges
OTA	Office of Technology Assessment
OWHT	Oily Waste Holding Tank
OWS	Oil / Water Separator
PA	Preliminary Assessment
PA	Pollution Abatement
PA	Programmatic Agreement
PAO	Public Affairs Office or Officer
PA/SI	Preliminary Assessment / Site Inspection
PCB	Polychlorinated Biphenyl
PCR	Pollution Control Report
PEL	Permissible Exposure Limit

PHE	Public Health Examination
PHSA	Public Health Service Act (see SDWA)
PI	Preliminary Injunction
PL	Public Law
PMIO	Particulate Matter less than 10 microns in diameter
POA & M	Plan of Action and Milestones
POC	Point of Contact
POL	Petroleum–Oil–Lubricant
POM	Program Objective Memorandum
POTW	Publicly–Owned Treatment Works
PPA	Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101 <i>et seq.</i>)
PPB	Parts Per Billion
PPBS	Planning, Programming and Budgeting System
PPM	Parts Per Million
PRP	Potentially Responsible Party
PSD	Prevention of Significant Deterioration
PWC	Public Works Center
PWS	Public Water System
QA/QC	Quality Assurance / Quality Control
QMB	Quality Management Board
QRP	Qualified Recycling Program
RA	Regional Administrator
RA	Remedial Action

RAB	Restoration Advisory Board
RACT	Reasonably Available Control Technology
RAP	Remedial Action Plan
RCRA	Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 <i>et seq.</i>)
RD	Remedial Design
R & D	Research and Development
RD/RA	Remedial Design / Remedial Action
RDT & E	Research, Development, Test, and Evaluation
REC	Regional Environmental
REO	Regional Environmental Office
RESO	Regional Environment Support Office
RHA	Rivers and Harbors Act (33 U.S.C. §§ 403, 406)
RI	Remedial Investigation
RI/FS	Remedial Investigation / Feasibility Study
ROD	Record of Decision
RQ	Reportable Quantity
RRT	Regional Response Team
SARA	Superfund Amendments & Reauthorization Act of 1986 (see CERCLA and EPCRA)
SARA III	Superfund Amendments & Reauthorization Act Title III (Emergency Planning and Community Right-to-Know-Act)
SCN	Ship Construction, Navy
SCP	Spill Contingency Plan
SDOSS	Sewage Disposal Operation Sequencing System

SDWA	Safe Drinking Water Act (42 U.S.C. §§ 300f <i>et seq.</i>)
SECDEF	Secretary of Defense
SECINT	Secretary of the Interior
SECNAV	Secretary of the Navy
SEP	Supplemental Enforcement Project
SERC	State Emergency Response Commission
SESO	Ship's Environmental Support Office
SHIPALT	Ship Alteration
SHPO	State Historic Preservation Officer
SI	Site Inspection
SIC	Subject Identification Code
SIC	Standard Industrial Classification
SINKEX	Sinking Exercise
SIP	State Implementation Plan
SLA	Submerged Lands Act (43 U.S.C. §§ 1301 <i>et seq.</i>)
SMCL	Secondary MCL
SMCRA	Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §§ 1201 <i>et seq.</i>)
SMSA	Standard Metropolitan Statistical Area
SNC	Significant Noncomplier
S02	Sulfur Dioxide
SOFA	Status of Forces Agreement
SOPA	Senior Officer Present Ashore (or Afloat)

SPCC	Spill Prevention Control and Countermeasure
SSA	Sole Source Aquifer
SQG	Small Quantity Generator
STEL	Short-term Exposure Limit
SUPSALV	Supervisor of Salvage
SUPSHIPS	Supervisor of Shipbuilding
SWDA	Solid Waste Disposal Act (see RCRA)
SWMU	Solid Waste Management Unit
SWTCP	Surface Water Toxic Controls Program
SYDP	Six Year Defense Plan
TCA	Trichloroethane
TCE	Trichloroethylene (Trichloroethane)
TDD	Treatment, Destruction, and Disposal (TDD) Facilities
TCLP	Toxicity Characteristic Leaching Procedure
TPQ	Threshold Planning Quantity
TQL	Total Quality Leadership
TRC	Technical Review Committee
TRI	Toxic Chemical Release Inventory
TRO	Temporary Restraining Order
TSCA	Toxic Substances Control Act (15 U.S.C. §§ 2601 <i>et seq.</i>)
TSD	Treatment, Storage or Disposal
TSDF	Treatment, Storage & Disposal Facility
TSP	Total Suspended Particulates

TSS	Total Suspended Solids
UIC	Underground Injection Control
UIC	Unit Identification Code
UNCLSO	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UORA	Used Oil Recovery Act
USAF	United States Air Force
USCG	United States Coast Guard
USDA	United States Department of Agriculture
USDW	Underground Source of Drinking Water
USFWS	U.S. Fish and Wildlife Service
USNPS	U.S. National Park Service
UST	Underground Storage Tank
VA	Veterans' Administration
VOC	Volatile Organic Compound
WACO	Western Area Counsel Office
WOCT	Waste Oil Collecting Tank
WPN	Weapons Procurement, Navy
WQA	Water Quality Act of 1987 (see FWPCA)
WQMC	Water Quality Management Control
WQMP	Water Quality Management Plan
YCC	Youth Conservation Corps

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Boston, MA 02203
CML (617) 565-3395
FTS 835-3395
States covered: CT, MA, ME, NH, VT, RI

2. **EPA REGION II (METRO)**
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States covered: NY, NJ, Puerto Rico, Virgin Islands

3. **EPA REGION III (MID ATLANTIC)**
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FTS 597-1168
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4. **EPA REGION IV (SOUTHEAST)**
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CML (404) 347-3376
FTS 257-3776
States covered: AL, FL, GA, NC, SC, KY, MS, TN

5. **EPA REGION V (THE HEARTLAND)**
230 Dearborn St.
Chicago, IL 60604
CML (312) 353-2035
FTS 353-2035
States covered: IL, IN, MI, MN, OH, WI

6. **EPA REGION VI (SOUTH CENTRAL)**
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FTS 255-2260
States covered: AR, LA, NM, TX, OK
7. **EPA REGION VII (PLAINS STATES)**
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CML (913) 236-2823
FTS 757-2823
States covered: IO, KS, MO, NB
8. **EPA REGION VIII (MOUNTAIN STATES)**
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Denver, CO 80202-2413
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FTS 564-1644
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APPENDIX III

STATE ENVIRONMENTAL PROGRAM
TELEPHONE NUMBERS

<u>Program</u>	<u>Alabama</u>	<u>Alaska</u>	<u>Arizona</u>
Solid Waste	205/271-7761	907/789-6751	602/257-2176
Hazardous Waste	205/271-7726	907/789-6751	602/257-2331
Superfund Remediation	205/271-7939	907/789-4877	602/257-6841
Air Quality	205/271-7861	907/465-2666	602/257-2308
Water Quality	205/271-7826	907/465-3342	602/257-2305
Coastal Zone Management	205/479-2336	907/789-3151	****
Wetlands	205/271-7984	907/789-3151	****
Oil Spills	205/260-2700	907/465-2630	602/257-2175
Public Info	205/271-7700	907/465-3341	602/257-2300

* * *

<u>Program</u>	<u>California</u>	<u>Connecticut</u>	<u>D.C.</u>
Solid Waste	916/322-3330	203/566-5847	202/382-4627
Hazardous Waste	916/324-1826	203/566-5712	202/382-4610
Superfund Remediation	916/427-4990	203/566-5486	703/920-9810
Air Quality	916/322-2990	203/566-3310	202/382-7548
Water Quality	916/322-3132	203/566-2588	202/382-5682

<u>Program</u>	<u>California</u>	<u>Connecticut</u>	<u>D.C.</u>
Coastal Zone Management	415/543-8555	203/566-7404	****
Wetlands	****	203/566-7280	202/475-7791
Oil Spills	916/322-3330	203/566-4633	202/382-2188
Public Info	916/322-6315	203/566-5599	202/382-2080

* * *

<u>Program</u>	<u>Florida</u>	<u>Georgia</u>	<u>Hawaii</u>
Solid Waste	904/922-6104	404/656-2836	808/543-8227
Hazardous Waste	904/488-0300	404/656-7802	808/543-8226
Superfund Remediation	904/488-0900	404/656-4713	808/543-8249
Air Quality	904/488-1344	404/656-4687	808/543-8200
Water Quality	904/488-3601	404/656-4905	808/543-8309
Coastal Zone Management	904/488-6221	912/262-2350	808/543-8335
Wetlands	904/488-0130	404/557-2770	808/543-8335
Oil Spills	904/488-0190	404/656-3214	808/543-8249
Public Info	904/488-4805	404/656-4713	808/543-8304

Programs	<u>Illinois</u>	<u>Louisiana</u>	<u>Maryland</u>
Solid Waste	217/782-6760	504/765-0355	301/631-3304
Hazardous Waste	217/782-8700	504/765-0355	301/631-3304
Superfund Remediation	217/782-6760	504/765-0700	301/631-3437
Air Quality	217/782-7326	504/765-0219	301/631-3260
Water Quality	217/782-1654	504/765-0634	301/631-3567
Coastal Zone Management	217/782-1654	504/765-0634	301/631-3567
Wetlands	217/782-6760	504/765-0634	301/631-3609
Oil Spills	217/785-5735	504/765-0634	301/331-2950
Public Info	217/782-2829	504/765-0741	301/631-3000

* * *

Programs	<u>Mississippi</u>	<u>New Jersey</u>	<u>New York</u>
Solid Waste	517/373-6195	609/530-8591	518/457-6603
Hazardous Waste	517/373-2730	609/633-1408	518/457-1684
Superfund Remediation	517/373-9837	609/984-2902	518/457-5866
Air Quality	517/573-7023	609/292-6704	518/457-7230
Water Quality	517/373-1940	609/292-1637	518/457-6674
Coastal Zone Management	517/373-2730	609/292-2795	518/457-6674

<u>Programs</u>	<u>Mississippi</u>	<u>New Jersey</u>	<u>New York</u>
Wetlands	517/373-2730	609/292-1235	518/457-2224
Oil Spills	517/373-9837	609/292-2662	518/457-7469
Public Info	517/373-9937	609/292-3131	518/457-5400

* * *

<u>Programs</u>	<u>N. Carolina</u>	<u>Pennsylvania</u>	<u>S. Carolina</u>
Solid Waste	919/733-0692	215/832-6212	803/734-5200
Hazardous Waste	919/733-2178	215/832-6212	803/734-5200
Superfund Remediation	919/733-2801	215/832-6212	****
Air Quality	919/733-3340	215/832-6241	803/734-4750
Water Quality	919/733-5083	215/832-6130	803/734-5310
Coastal Zone Management	919/733-2293	****	803/734-5300
Wetlands	****	215/832-6340	803/734-5300
Oil Spills	404/347-2216	215/832-6130	803/734-5200
Public Info	704/336-5500	215/832-6000	803/734-5000

* * *

<u>Programs</u>	<u>Tennessee</u>	<u>Texas</u>	<u>Virginia</u>
Solid Waste	615/741-3424	512/463-7760	804/225-2667
Hazardous Waste	615/741-3424	512/463-7760	804/225-2667

<u>Programs</u>	<u>Tennessee</u>	<u>Texas</u>	<u>Virginia</u>
Superfund Remediation	615/741-6287	****	804/225-2631
Air Quality	615/741-3931	512/451-5711	804/766-6035
Water Quality	615/741-2275	512/463-8028	804/367-0056
Coastal Zone Management	****	512/475-1467	804/367-0056
Wetlands	615/741-2275	512/475-1467	804/225-2667
Oil Spills	615/741-7883	512/463-6887	804/225-2667
Public Info	615/741-3657	512/463-2012	804/225-2667

* * *

<u>Programs</u>	<u>Washington</u>
Solid Waste	206/459-6322
Hazardous Waste	206/438-3000 800/633-7585
Superfund Remediation	****
Air Quality	206/459-6322
Water Quality	206/459-6835
Coastal Zone Management	206/459-6835 800/447-3330
Wetlands	206/459-6835
Oil Spills	206/753-2353
Public Info	206/459-6000

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MAY 19 1994

MEMORANDUM FOR DISTRIBUTION:

From: General Counsel of the Navy
Judge Advocate General of the Navy

Subj: Environmental Law Training and Research Materials

Ref: (a) U.S. Navy Regulations, Article 0327
(b) U.S. Navy Regulations, Article 0331
(c) GC/OP-09J memorandum of 8 NOV 91

Encl: (1) Training Standards
(2) Standards for Research/Reference Materials

1. **Summary.** This memorandum establishes certain minimum standards for the training and support of counsel responsible for providing advice to commands on environmental law issues, including international environmental law issues. The standards are issued pursuant to references (a) and (b) and cover basic training to be completed within a year of assuming duties that include responsibility for providing advice on environmental law issues, continuing legal education, and research and reference materials necessary to provide legal advice. These standards supersede those established by reference (c), which is cancelled.

2. **Background.** Environmental law issues continue to demand increased attention from commanders and their counsel. The nation's environmental programs contain numerous legal requirements that can affect the operations of the Department of the Navy, both in CONUS and abroad. Passage of the Federal Facilities Compliance Act, Pub. L. No. 102-386 (1992) exposed commands to civil penalties for violation of hazardous waste laws and the potential for similar liability in other areas of environmental law is high. Because each state and locality has authority to create its own program in response to the major federal environmental laws, familiarity with the local requirements as well as the more basic federal legal materials has become increasingly important for Department of Navy counsel. Environmental laws are also constantly under revision and expansion. Environmental protection at overseas installations has also received greatly increased attention. Navy attorneys must have current training and ready access to current legal materials to support the goal of environmental leadership set by the Secretary of the Navy.

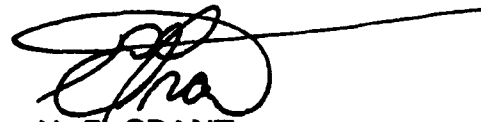
3. **Action.** The standards established in enclosures (1) and (2) are the minimum levels for attorneys with environmental law responsibilities in legal offices at shore and afloat commands and should form the basis for training and procurement

actions. This guidance is effective immediately, and will be revised as necessary to respond to additional specific needs or other training plans and requirements now under review.

4. The initial training requirement should be met within one year of assuming responsibilities for advice on environmental law issues. Continuing legal education requirements may be met through presentation of instruction in environmental law in courses offered for other Department of the Navy attorneys, officers and employees, so long as the course is open to personnel of other commands. Reference material requirements should be met as the materials become available and the materials can be funded and procured.



STEVEN S. HONIGMAN
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TRAINING REQUIREMENTS

TRAINING SUBJECTS	MAJOR' SHORE DOMESTIC	OTHER SHORE DOMESTIC	MAJOR SHORE OVERSEAS ²	OTHER SHORE OVERSEAS	AFLOAT
1. Environmental organization, sovereign immunity, regulatory designs, statutory interpretation, ECEs, personal liability	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED
2. Control of air pollution	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED
3. Control of water pollution	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED
4. Handling and disposal of solid and hazardous waste, IR program, pollution prevention and SARA Title III	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED
5. Environmental planning	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED
6. Natural and cultural resources protection and management	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED
7. Management of oil and hazardous material spills	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED
8. Ocean dumping/shipboard pollution control	REQUIRED		REQUIRED		REQUIRED ³
9. Handling and disposal of medical waste	REQUIRED		REQUIRED		REQUIRED
10. Environmental compliance overseas, including SOFAs, Basel Convention and Overseas Environmental Baseline Guidance Document	REQUIRED ⁵		REQUIRED	REQUIRED	REQUIRED
11. Total hours for initial training:	14 hours	7 hours	14 hours ⁴	7 hours ⁴	7 hours
12. CLE (based on an annual average):	7 hours	3.5 hours	7 ⁴ hours	3.5 ⁴ hours	3.5 hours

NOTES:

1. For purposes of these standards, commands with major environmental responsibilities include the following:
 - a. CINCLANTFLT, CINCPACFLT, CINCSNAVEUR, CNET, CHNAVRESFOR
 - b. Headquarters offices of NAVFAC, NAVSEA, NAVAIR, NAVSUP
 - c. Commands serving as regional environmental coordinators
 - d. Engineering field divisions and activities, shipyards and naval aviation depots
2. Overseas shore commands are those located outside the United States, Guam, Puerto Rico, or territories and possessions of the United States. All other commands must comply with the "Domestic" standards.
3. Must include training on treaties regulating shipboard pollution control.
4. At least half the training must deal with environmental law of nations or regional organizations within the command's area of responsibility.
5. Only commands with significant supervisory responsibilities for units operating outside the United States, including fleet commanders and naval components of unified and subunified commands.

REFERENCE MATERIAL REQUIREMENTS						
ITEM	MAJOR SHORE DOMESTIC	OTHER SHORE DOMESTIC	MAJOR SHORE OVERSEAS ²	OTHER SHORE OVERSEAS	AFLOAT	
1. Consolidated OGC/JAG deskbook on environmental law	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED	
2. Current Department of Navy environmental guidance documents, to include as appropriate, OPNAVINST 5090.1A, MCO P5090.2, applicable SECNAV, OPNAV, FLEET, SYSCOM and TYCOM instructions, SOPA and area coordinator instructions on spill response and reporting. instructions.	REQUIRED	REQUIRED	REQUIRED	REQUIRED	REQUIRED	
3. A current copy or compendium of Federal environmental laws.	REQUIRED	REQUIRED	REQUIRED		REQUIRED	
4. Current copies of the Code of Federal Regulations, Titles 29, 33, 40, and 50	REQUIRED	READY ACCESS ³	READY ACCESS		AS SPACE PERMITS	
5. A comprehensive environmental loose leaf service with current supplements, case reports, statutory summaries or equivalent electronic resource (Domestic U.S. emphasis)	REQUIRED ⁴	READY ACCESS				
6. A comprehensive environmental loose leaf service with current supplements, case reports, statutory summaries (International emphasis)			REQUIRED	READY ACCESS		

REFERENCE MATERIAL REQUIREMENTS						
ITEM	MAJOR SHORE DOMESTIC	OTHER SHORE DOMESTIC	MAJOR SHORE OVERSEAS ¹	OTHER SHORE OVERSEAS	AFLOAT	
7. Current policy statements on the Implementation of FFCA: a. "EPA Guidance on Implementation of the Federal Facilities Compliance Act" (6 July 1993, published at 58 Fed. Reg. 49044 (Sept. 21, 1993)) b. "DOD Policy on Implementation of the Federal Facilities Compliance Act of 1992" (Dec. 17, 1992)	REQUIRED	REQUIRED				
8. Current policy statements on EPA penalty policies, "RCRA Civil Penalty Policy" (October 1990)	REQUIRED	READY ACCESS				
9. Current policy statements on EPA settlement policies: a. "EPA Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements" b. "Policy on the Use of Supplemental Enforcement Projects" (February 12, 1991).	REQUIRED	READY ACCESS				

REFERENCE MATERIAL REQUIREMENTS					
ITEM	MAJOR' SHORE DOMESTIC	OTHER SHORE DOMESTIC	MAJOR SHORE OVERSEAS ²	OTHER SHORE OVERSEAS	AFLOAT
10. A copy of the basic SOFA (and any supplemental agreements respecting environmental issues)	REQUIRED ³		REQUIRED	READY ACCESS	
11. DOD Overseas Environmental Baseline Guidance Document, Final Governing Standards for any countries wherein the command maintains or advises installations	REQUIRED ³		REQUIRED	REQUIRED	
12. State environmental statutes for states containing activities within the cognizance of the command.	REQUIRED	READY ACCESS			
13. State and local administrative regulations for states within the cognizance of the command.	REQUIRED	READY ACCESS			
14. Federal and state (for states within the cognizance of the command) case reporters.	READY ACCESS	READY ACCESS			
15. Defense Environmental Information Exchange (DENIX)	READY ACCESS				
16. Copies or looseleaf services of regional, community (for example, European Community) or similar multilateral environmental directives and regulations for any countries wherein the command maintains or advises installations.	REQUIRED ³		REQUIRED	READY ACCESS	

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 - b. Headquarters offices of NAVFAC, NAVSEA, NAVAIR, NAVSUP
 - c. Commands serving as regional environmental coordinators
 - d. Engineering field divisions and activities, shipyards and naval aviation depots
2. Overseas shore commands are those located outside the United States, Guam, Puerto Rico, or territories and possessions of the United States. All other commands must comply with the "Domestic" standards.
3. Materials that are readily available are those that are available within the local area, or which may be accessed electronically.
4. Ready access is sufficient for shipyards and naval aviation depots.
5. Only commands with significant supervisory responsibilities for units operating outside the United States, including fleet commanders and naval components of unified and subunified commands. Only those documents applicable to their subordinate units are required.